IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

Office Supreme Court U. S.
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EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,
against
THOMAS G. RITCH *et al.*, Individually and as Executors, etc., and others,
Appellees.

No. 157.

JOHN B. REYNOLDS, as sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased,
Appellant,
against
THOMAS G. RITCH *et al.*, Individually and as Executors, etc., and others,
Appellees.

No. 158.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES

THOMAS G. RITCH, JUSTUS L. BULKLEY AND HENRY B. VAUGHAN.

New York:
Chas. P. Young, Law Reporter and Printer.
29-37 William St. [Tel., 1273 John.]

1904.

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STATEMENT OF CASE.

These causes are here on appeals of Emma S. Fayerweather and Mary W. Achter, complainants

in the bill, and John B. Reynolds, as sole executor of the last will and testament of Lucy Fayerweather, deceased, and of the codicil thereto, complainant in the cross-bill, from the judgment or decree of the Circuit Court of the United States for the Southern District of New York, dismissing the bill and cross-bill.

Will and Codicils of Daniel B. Fayerweather.

Daniel B. Fayerweather, a resident of New York City, died November 15th, 1890, leaving a will, four codicils and an estate of several millions, consisting chiefly of personal property, and substantially no debts. He left no child or descendant, but a widow, Lucy Fayerweather, and three nieces, Emma S. Fayerweather, Mary W. Achter and Lucy Beardsley, his only heirs at law and next of kin. His will is dated October 6th, 1884. By the first and second articles he revoked all prior wills and provided for the payment of his debts, funeral expenses and costs, and charges of administration.

By the third, fourth and fifth articles, he gave to his wife $10,000, his dwelling house and furniture therein, his stable, horses and carriages, and an annuity of $15,000 during her life, and directed that the provisions in his will for her benefit should be in lieu of dower, or other interest, in his estate.

By the sixth article he gave Anna Amelia Joyce an annuity of $1,000 for her life, or so long as she remained unmarried.

By the seventh article he gave to Lucy J. Beardsley $100,000, and to Mary W. Achter and Emma S. Fayerweather (formerly Emma S. Drury) $10,000 each, and a minor legacy to an employee.

By the eighth article he gave to the,

Presbyterian Hospital	$25,000.
St. Luke's Hospital	25,000.
Manhattan Eye and Ear Infirmary	25,000.
Women's Hospital	10,000.
Mt. Sinai Hospital	10,000.

By the ninth article he gave the following sums to the following colleges:

Bowdoin College	$100,000.
Dartmouth College	100,000.
Williams College	100,000.
Amherst College	100,000.
Wesleyan University	100,000.
Yale College	300,000.
Columbia College	200,000.
Union Theological Seminary	50,000.
Hamilton College	100,000.
University of Rochester	100,000.
Cornell University	200,000.
Lafayette College	50,000.
Lincoln University	100,000.
University of Virginia	100,000.
Hampton University	100,000.
Maryville College	100,000.
Marietta College	50,000.
Adelbert College	50,000.
Wabash College	50,000.
Park College	50,000.

By the tenth article he gave the residuary estate to his executors in trust, to be divided among the twenty colleges named in the ninth article, share and share alike.

By the eleventh article he appointed Thomas G. Ritch and Justus L. Bulkley executors and trustees.

On the day the will was executed testator signed the following statement:

"This certifies that I have executed my will

"of this date, having been advised by my coun-
"sel of the provisions and restrictions of the
"law of this state relative to benevolent cor-
"porations. I trust my heirs will permit the
"provisions of this, my will, to be carried into
"effect."

The will and this paper were prepared under the direction of Thomas G. Ritch and were given to him for safe keeping when executed. There was in force at the time Chapter 360 of the Laws of 1860, which forbids a testator leaving a wife, child or parent to give more than one-half of his estate to charitable, benevolent or literary institutions.

FIRST CODICIL.

On December 13th, 1884, testator made the first codicil to his will, by which he revoked the tenth paragraph, in which he had given his residuary estate to his executors to be divided among the twenty colleges named in the ninth article of the will, and gave said residuary estate to said Bulkley and Ritch absolutely. In other respects the will was ratified.

Another paper was prepared and signed by the testator, bearing date December 11th, 1884, and headed "Private Memorandum," of which the following is a copy:

"I have made Messrs. Bulkley and Ritch my
"residuary legatees, in the confidence that
"thereby my intentions as expressed in my will
"shall be carried into effect, and without litiga-
"tions on the part of any person or persons in-
"terested. In case of my death I trust they
"will take such steps by will or otherwise, as
"will protect my estate against the contin-
"gency of the death of either before my estate
"is settled and distributed."

SECOND CODICIL.

On January 7th, 1888, testator made a second codicil, by which, after making certain bequests to employees in his firm, he named Henry B. Vaughan as an additional executor and trustee, and ratified the will and first codicil in other respects.

THIRD CODICIL.

On March 19th, 1889, testator made a third codicil, by which he increased the legacies to Anna Amelia Joyce, Mary W. Achter and Emma S. Drury; provided for the purchase of a burial lot and the erection of a monument, and made bequests to specified persons in his employ.

On March 22nd, 1889, testator signed the following memorandum:

> "Having made inquiries with regard to "Hampton and Lincoln Universities, it is my "judgment that the bequests to them should be "withheld. I think the bequest to Cornell "University should not exceed $100,000. If "the Northwestern University, at Evanston, "Illinois, is in a prosperous condition I should "recommend that $100,000 be given to it. If "the following persons are in my employ at the "time of my death, I suggest that they receive "the following sums: Rogers and Clark $500 "each; Gould, Campbell and Stone $300 each, "and Carpenter $250; also James, who now "opens and closes the store, $100. John Dixon "$200. I also wish that $1,000 be given to Miss "Joyce immediately after my decease, in addi- "tion to the provision made for her by my "will."

FOURTH CODICIL.

On November 15th, 1890, testator made a fourth codicil providing substantially as follows:

First: Ratified and confirmed will and codicils except as modified.

Second: Confirmed revocation of tenth paragraph of will.

Third: Changed third paragraph of codicil of December 13th, 1884, by giving residuary estate to Ritch, Bulkley and Vaughan absolutely and forever.

Upon Mr. Fayerweather's death the will and codicils were propounded by his executors, for probate, before the Surrogate of New York County. The widow and nieces first consented to probate, said consents were subsequently withdrawn and objections, based upon the usual grounds of fraud, undue influence, want of testamentary capacity and defective execution, were filed by them. The widow was represented by Frederick R. Coudert and the nieces by Daniel G. Rollins. The trial began February 2nd, 1891. The various papers were read in evidence, Messrs. Ritch, Vaughan and others examined at length as witnesses, and on the 17th of February, the Surrogate announced his intention to admit the will to probate, leaving the contest of the codicils to continue. On the 24th of February, Messrs. Ritch, Bulkley and Vaughan, the residuary legatees, executed an instrument known as the Deed of Gift, whereby, after reciting that they were prompted by the determination not to retain for their own use any part of the residuary estate left to them by the will, and by the desire to make such use of the residuary estate as in their judgment would best honor the memory of Mr. Fayerweather, they disposed of the same as follows:

They reserved the power to make and retained the right to assent to any enlargement of the provisions made by the will for Mrs. Fayerweather, Mrs. Achter and Mrs. Drury, in case they should be satisfied that such enlargement would not be against the wishes of Mr. Fayerweather. They gave to Mrs. Beardsley $100,000, to Miss Joyce and others, certain amounts, including the sum of $100,000 to the Northwestern University. They then gave $465,000 to eleven hospitals, including the sum of $200,000 additional, to the Women's Hospital. To twenty-one colleges they gave $1,570,000 and directed that the amount in each case should be used as a Fayerweather Fund in some distinctive manner, either for the erection of buildings, the establishment of scholarships, or other use, which, in the judgment of the authorities, would be of the greatest practical benefit. The rest of the residuary estate, they divided into ten parts, and gave five to the Women's Hospital, one to the Presbyterian Hospital and one to each of four colleges, two of which were named in the will. They closed the instrument as follows:

> "We execute this instrument, recognizing "that there is pending a contest in proceedings "for the probate of Mr. Fayerweather's will, "and recognizing further that if such contest "shall not prevail, a question may be made "about our legal rights as devisees and legatees. "* * * Our object is each for himself to give "away whatever may come to us as residuary "devisees and legatees under Mr. Fayer-"weather's will. * * *."

Of the eleven hospitals and twenty-one colleges named in said Deed of Gift only five of the former and six of the latter were mentioned in the will.

On March 5th, after the Deed of Gift had been

announced and made known, the widow and next of kin executed the following paper:

"In consideration of the instrument of even "date herewith executed by Justus L. Bulkley, "Thomas G. Ritch and Henry B. Vaughan, "residuary devisees and legatees under the will, "meaning thereby the original will and sub- "sequent codicils of Daniel B. Fayerweather, "* * *, we, the undersigned, being the "widow and all of the next of kin of said Daniel "B. Fayerweather, do hereby severally agree "for ourselves, our and each of our heirs, exe- "cutors and administrators, as follows:

"1. *All objections to the probate of the will "and four codicils of the late Daniel B. Fayer- "weather offered for probate, are hereby with- "drawn, and we consent to the probate of the "same.*"

"2. *No suit shall hereafter be brought for "the construction of the said will and codicils, "or either of them, or to set aside the will and "codicils or either of them,* and we further "agree not to make any claim upon the said "Justus L. Bulkley, Thomas G. Ritch and "Henry B. Vaughan, or either of them, or "against their heirs or personal representa- "tives, or either against them, the said Bulkley, "Ritch and Vaughan, as executors, or as resi- "duary legatees, other than for the amounts "left to us by the will and codicils aforesaid, "and the deed of gift executed by the said "Bulkley, Ritch and Vaughan on the 24th day "of February, 1891, and the instrument dated "on the 5th day of March, 1891."

"3. Upon the payment to the undersigned "respectively, of the several amounts men- "tioned in said deed of gift and said instru-

"ment, we will severally execute a general "release of all claims, except those arising "under the will and codicils, both to the exe- "cutors and to the donees mentioned in the "deed of gift, dated on the 24th day of Febru- "ary, 1891, and to the said Bulkley, Ritch and "Vaughan individually."

The instrument of even date referred to in this paper was executed by Messrs. Bulkley, Ritch and Vaughan on March 5th, whereby under the power reserved in the deed of gift, they gave to Mrs. Fayerweather $225,000 and increased her annuity from $15,000 to $25,000, to Mrs. Achter $42,500, and to Mrs. Drury (now Mrs. Emma S. Fayerweather) the same amount.

On March 24th, 1891, the codicils were admitted to probate upon written consent signed by the attorneys for all the parties to the contest.

On June 12th, Mrs. Fayerweather executed a release, of which the follwing is a copy:

Mrs. Fayerweather's Release.

"To all to whom these presents shall come, "or may concern, greeting: Know ye, that I, "Lucy Fayerweather, widow of Daniel B. "Fayerweather, of the City of New York, for "and in consideration of the sum of $225,000, "lawful money of the United States to me in "hand paid by Justus L. Bulkley, Thomas G. "Ritch and Henry B. Vaughan, as executors "and trustees under the last will and testament "of Daniel B. Fayerweather, deceased, and in- "dividually, and as representatives of the "persons or corporations hereinafter named, "forming a class known as donees under the "deed of gift executed by the said Bulkley,

"Ritch and Vaughan on February 24th, 1891,
"which sum is in compromise and full settle-
"ment of any and all contests on my part of
"the will of said Daniel B. Fayerweather, de-
"ceased, or concerning his estate, have remised,
"released and forever discharged and by these
"presents do, for myself and for my heirs, ad-
"ministrators and executors, remise, release
"and forever discharge the said Justus L.
"Bulkley, Thomas G. Ritch and Henry B.
"Vaughan, as executors and trustees aforesaid,
"as individuals and as representatives of the
"said donees, constituting a class, and also
"the said donees, to wit, the persons and cor-
"porations mentioned in a certain deed of gift
"duly delivered, made by Justus L. Bulkley,
"Thomas G. Ritch and Henry B. Vaughan, on
"the 24th day of February, 1891, which deed of
"gift was introduced in evidence in the probate
"proceedings of the last will and testament of
"Daniel B. Fayerweather, deceased, and
"marked Exhibit No. 7, and which said deed of
"gift is hereby made a part of this release, in
"order that the persons constituting said class
"of donees and to whom this release runs, may
"be more fully known, and also the legal suc-
"cessors, assigns, heirs, executors and adminis-
"trators of all the aforesaid persons and cor-
"porations, of and from and all manner of
"action and actions, cause and causes of action,
"suits, debts, dues, sums of money, claims and
"demands whatsoever, in law or in equity,
"which against the said persons or corpora-
"tions, or any of them, I ever had, or now have,
"or which I or my heirs, executors or adminis-
"trators, hereinafter shall, can or may have,
"for, upon, or by reason of any matter, cause
"or thing whatsoever, except my claim for the
"annuity given me by the will and codicils

"thereto of said Daniel B. Fayerweather, de-
"ceased, and also my claim for the increased
"annuity mentioned in the agreement dated
"March 5th, 1891, and made pursuant to the
"deed of gift above referred to."

Releases of Emma S. Fayerweather and Mary W. Achter.

Similar releases were at the same time executed by or in behalf of the next of kin, Emma S. Fayerweather (then known as Emma S. Drury) Mary W. Achter and Lucy J. Beardsley.

Payments were promptly made by the executors from the fund of the estate to the widow and next of kin on the basis of the settlement.

Anna Amelia Joyce, named in the sixth article of the will, was a sister of Mrs. Fayerweather. She subsequently married John B. Reynolds, the complainant in the cross-bill. Mrs. Drury, having obtained a divorce, resumed her maiden name, and is known as Emma S. Fayerweather, one of the complainants in the bill. Mary W. Achter is the other complainant.

When his will was made Mr. Fayerweather was worth about $3,000,000; at the time of his death, about $5,000,000.

Mrs. Fayerweather died July 16th, 1892, leaving a will, whereby she gave the bulk of her estate to her sister, Miss Joyce (now Mrs. John B. Reynolds).

The Suit.--Amherst vs. Ritch.

In June, 1893, the Trustees of Amherst College, the Trustees of Dartmouth College, the Trustees of Hamilton College, the University of Rochester

and the President and Trustees of Williams College, began an action in the Supreme Court in the State of New York against the executors and trustees, Bulkley, Ritch and Vaughan, and all parties who might by any possibility be interested in the estate of Daniel B. Fayerweather.

The theory of the complaint was that the apparently absolute gift in the fourth codicil to Messrs. Ritch, Bulkley and Vaughan, individually, was really upon a secret trust for the benefit of the plaintiffs and the remaining colleges named in the ninth clause of the will.

In that action (the widow, Mrs. Fayerweather, having died), her executor John B. Reynolds, complainant in the cross-bill, Emma S. Fayerweather and Mary W. Achter, the complainants in the bill herein, were made parties defendant, and all appeared by William Blaikie and Edward C. James, as their attorneys and counsel, and filed their answers, wherein they alleged in effect that the apparently absolute devise to Bulkley, Ritch and Vaughan was, in fact, a trust for the benefit of the colleges named in the ninth clause of the will, that that trust was void under Chapter 360 of the Laws of 1860, that the releases given by the widow and next of kin were fraudulent and void, and asked that the residuary estate be awarded them.

The executors and trustees, Ritch Bulkley and Vaughan, and the donees named in the deed of gift, all appeared, answered and claimed that the donees were entitled to the fund.

The case was tried at Special Term before Justice Truax. Upon this trial the widow's executor and next of kin were duly represented by their attorneys and counsel, William Blaikie and Edward C. James. The trial lasted several days. The record of the trial was offered in evidence and will be found in volume 5 of the record in this court, entitled *Trustees of Amherst College, et al.*, v.

Ritch. The complaint of the plaintiffs in that record will be found at page 11 to page 26. In the fifth paragraph of the prayer for relief is the following language (p. 25):

> "That the said defendants, Ritch, Bulkley and Vaughan, may be required to account for the moneys received by them under said last will and testament and codicils, and that they may be required to apply so much thereof as they may have received upon the trusts hereinbefore stated to the purpose of said trust.
>
> "6. *That the ultimate rights of the plaintiffs as between them and each of them, and every of the other defendants herein, be determined by the judgment in this action in accordance with the allegations of this complaint and the prayer hereinbefore contained.*"

The answer of the defendants, Emma S. Fayerweather and Mary W. Achter, and John B. Reynolds as executor of Mrs. Fayerweather, in that action will be found at page 60 of volume 5 of the record herein.

In their answer said Fayerweather, Achter and Reynolds set out the will of 1884 and the Fourth Codicil thereto, the secret trust for the twenty colleges and the probate decrees and releases, alleged that the trust was void, that the releases were invalid, because procured by concealment and fraud and upon inadequate consideration, and prayed that the settlement and releases be adjudged to be fraudulent and void, and "*that the ultimate rights of the parties to this action in the estate of said Daniel B. Fayerweather be determined and enforced by the judgment in this action, in accordance with the allegations of this answer and foregoing prayer for relief herein*" (see p. 79, Vol. 5 of Record, fol. 314).

The trial before Judge Truax at Special Term of

the Supreme Court was begun on the 22nd of January, 1894 (p. 7, fol. 26, Vol. 5 of Record). Edward C. James and William Blaikie appeared for Reynolds, Achter and Fayerweather (p. 275, fol. 1099 of said Record).

The following references to the Record of the trial will show that the counsel for Fayerweather, Achter and Reynolds not only had opportunity, but did represent the interests of their clients and were actually heard:

Page 312, fol. 1245
" 313 " 1251
" 315 " 1258
" 316 " 1262

At page 316, folio 1264, Mr. Ritch, one of the executors, a witness, was cross-examined by Mr. James, who stated that he was acting for the widow's executor and for Mrs. Achter and Emma S. Fayerweather. Objection being made to their participation in the trial, the objection was overruled and Col. James was permitted to proceed with an extended cross-examination of the witness, from page 317 to page 329, where, at folio 1315 the Court interrupted the examination with the following statement:

> "Perhaps it is proper to state what the views of the Court with respect to Col. James' position are.
>
> "Col. James' clients were made parties to this action because one of them was the widow and the others the next of kin of Mr. Fayerweather, and as such, in the absence of the will, would be entitled to this estate. If this residuary legacy is set aside, in whole or in part, as such widow and next of kin they would be entitled to that money.
>
> "That there is or was an agreement of release between the executors and them is imma-

terial, because in this action when the release is proved they may avoid the release the same as in an action for negligence, where the defendant sets up a release and the plaintiff responds to it by saying the release was obtained by fraud. It was unnecessary for him to set up the making of releases or to attack the making of releases in his answer. He could have done it without having alluded to it in the pleadings. Those are my views upon the position of Col. James."

And at page 330, folio 1317, Col. James calls for the production of the releases and continues the cross-examination of Mr. Ritch, from page 330 to page 343, folio 1371.

At pages 345, 346, 347, 348, 349, 351 and 353 of the Record in Amherst v. Ritch, were offered in evidence the consents withdrawing the objections to probate, the orders of the Surrogate, and the quitclaims and releases of Lucy Fayerweather, widow, and Emma S. Fayerweather and Mary W. Achter, to the admission of which, as evidence, objection was made by Col. James.

The cross-examination of Mr. Ritch was resumed at page 364 of the Record by Col. James, and continued to page 367, folio 1466.

At page 405 the witness Joseph Ladew was examined, and at page 416, was cross-examined by Col. James.

At page 440 the witness Haley Fiske was cross-examined by Col. James, from folio 1760 to folio 1776 on page 444.

At page 444 the witness James H. Raymond was called, and at page 446 was cross-examined by Col. James.

At page 449 the witness Henry B. Vaughan was called, and was cross-examined by Col. James from page 497 to page 516.

The witness John R. MacArthur, called at page

561, was cross-examined by Col. James at page 565.

At page 582 John Arthur Irwin was called as a witness on behalf of the widow's executor and Emma S. Fayerweather and Mary W. Achter, and examined by Col. James from page 582 to page 589, and again at page 597.

At page 655 Franklin B. Myrick was called and examined by Col. James to page 667, and again at page 669.

At page 670 Mr. Ritch was called by Col. James and examined to page 673, and again at page 675.

At page 675 another of the executors, Justus L. Bulkley, was called and examined by Col. James to page 677.

At page 681 the witness, Anna Amelia Joyce Reynolds, wife of the plaintiff John B. Reynolds in the cross-bill, was called by Col. James and examined from page 681 to page 695, and continued from page 728 to page 731.

The witness Franklin B. Myrick was examined by Col. James from page 734 to page 737.

On December 28, 1894, Judge Truax rendered a decision in favor of the plaintiffs (see Decision, p. 265 of Record, Amherst v. Ritch, Vol. 5 of Record herein). This decision stated concisely the grounds upon which the issues had been decided, without making findings in detail. This form of decision, in lieu of findings, was in pursuance of the general request of counsel for all parties, including counsel for Reynolds, Fayerweather and Achter (see testimony Jas. L. Bishop, Vol. 3 of transcript of Record, pp. 554 and 555).

At that time, Section 1022 of the Code of Civil Procedure of the State of New York was in force, and provided as follows:

> "The decision of the Court or the report of a referee upon the trial of the whole issues of fact may state separately the facts found and

the conclusions of law, and direct the judgment to be entered thereon; or the Court or Referee, in deciding the issues, may file a decision stating concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form a part of the judgment roll.

* * *

"Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon, upon a case containing exceptions, the General Term of the Court in which the action is pending shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to."

Laws, 1894, Ch. 688, Stat. N. Y.

Upon this decision, judgment was entered in favor of the plaintiffs on December 28, 1894 (Vide Judgment, p. 267, Amherst v. Ritch, Vol. 5).

It recites the appearance of the defendants, John B. Reynolds as executor of the last will and codicil of Lucy Fayerweather, deceased, Mary W. Achter and Emma S. Fayerweather, by William Blaikie, their attorney (see fol. 1074, p. 269, Amherst Record) and adjudges that the residuary estate was held by the executors in trust for the plaintiffs and other colleges named in the ninth article of the will and the Northwestern University, directs the executor to convert the residuary estate and pay over the same to said institutions, and appoints Charles W. Dayton Referee to take and state the accounts of said executors (see Decree, p. 267 of Amherst Record).

From this judgment Reynolds, Fayerweather and Achter appealed to the General Term of the

Supreme Court of the State of New York (see Notice of Appeal, p. 971 Amherst Record).

In that court, their appeal was argued and a brief will be found in Volume 7 of the Record herein, pages 1 to 197, and in the thirteenth point, says:

> "There should be affirmative relief to defendants" (page 188, vol. 7, fol. 564).

And at page 191, fol. 571:

> "We see no reason why this Court with its ample powers may not undo the injustice which has been perpetrated in this case, defeat the scheme intended to evade the statute for the protection of the widow and next of kin, and distribute this great estate among those to whom it rightfully belongs."

And at page 193, under the head of "Conclusions," the defendants expressly ask for affirmative relief as follows:

> "It is respectfully submitted that there should be judgment in this action adjudging as follows * * *
>
> "5th. That the agreements and releases obtained by said Ritch, Bulkley and Vaughan from the widow, Mrs. Lucy Fayerweather, and from Mrs. Mary W. Achter and Emma S. Fayerweather, two of the three nieces and next of kin of said testator, are fraudulent and should be set aside and cancelled, and the considerations paid to them respectively therefor from the residuary estate of said testator should be charged against and deducted from the amounts to which they are respectively entitled in said residuary estate."

And again, at page 195, as follows:

> "9th. In the alternative, that the Court may find that the trust upon which said residuary

estate was devised and bequeathed to said Rich, Bulkley & Vaughan, was to give the same to other institutions not designated, as Mr. Vaughan testified it was, it is respectfully submitted that there should be judgment declaring such trust void for indefiniteness; adjudging the whole of said residuary estate to have been held by said trustees since the death of Mr. Fayerweather upon a resulting trust for the widow and next of kin, and to belong to them; setting aside the releases of the widow and Mrs. Achter and Mrs. Emma S. Fayerweather as fraudulent; adjudging the release of Mrs. Beardsley to enure to the benefit of the widow and the other two next of kin; setting aside the deed of gift, except as to the approved payments; directing a reference and accounting, and a payment of the amounts for which the said Ritch, Bulkley and Vaughan are found liable on said accounting to the executors of the will of Lucy Fayerweather and Mrs. Achter and Mrs. Emma S. Fayerweather, according to their rights therein as determined by said judgment."

The judgment was affirmed by the General Term (see Order, p. 1057 Amherst Record, and Judgment, p. 1064 of same record).

Two opinions were filed on the affirmance of the judgment, one by Judge Follett, concurred in by Judge Alton B. Parker, the other by Judge Van Brunt. JUDGE FOLLETT, in disposing of the appeal of the widow's executor and next of kin, says:

"It is urged that these releases were procured by fraud and undue influence. There is no evidence in the record justifying this contention. The terms of the settlement were agreed on during the controversy in the Surrogate's Court over the probate of the will and codicils, and the widow and heirs were represented in that controversy and in the settle-

ment by distinguished counsel and acted under their advice."

(See Opinion, p. 1114, fol. 4449 Amherst Record.)

JUDGE VAN BRUNT, in his opinion at page 1117, folio 4463, says:

"The testator left him surviving a widow, who is the only person who could call into operation for her protection the statute which we have quoted. The widow, however, has released to the executors all claims to the estate, which release cannot be successfully attacked or set aside."

From the judgment of affirmance by the General Term, Reynolds, Fayerweather and Achter appealed to the Court of Appeals. Upon the argument in that court, Mr. Blaikie and Mr. James again appeared, made argument and submitted a brief. This brief is printed in Volume 7 of the Record in this case, and will be found from page 197 to page 388, and a reply brief on page 389 to page 411.

In their oral argument and printed briefs, no claim was made for a new trial, but the Court was expressly asked to render affirmative relief. It was not claimed that there were errors of the Court below in the exclusion or admission of evidence to their prejudice; they did not complain of injury or prejudice by reason of the failure of the Trial Judge to consider the question of fraud in the releases. In their twenty-sixth point they said:

"The judgment and order appealed from should be modified by setting aside the agreement and releases executed by the widow and nieces of Mr. Fayerweather as inequitable and fraudulent, and awarding to the executors of Mrs. Fayerweather's will and the nieces, re-

spectively, their distributive shares of her residuary estate, under Chapter 360 of the Laws of 1860, and the Statute of Distribution, less those parts thereof which they have already received as gifts, as so modified, with proper directions to carry the change into effect, the judgment and order should be affirmed."

(See Vol. 7 of Record, p. 388.)

Speaking of findings, the brief, at page 207, folio 619, says:

"As above stated, this record contains no findings of fact. The judgment appealed from was entered just before January 1, 1896. It is open for examination in this Court upon the whole record."

At page 277, paragraph 22, the brief says:

"This Court has full power, upon the record in this case, to restore to the widow's executor and to the nieces their distributive shares in this residuary estate."

And at another place:

"We, therefore, respectfully submit that there is some evidence in this record that these releases were procured by fraud and undue advantage, and leave it for this Court to decide whether these transactions have not been successfully attacked" (Vol. 7 of Rec., p. 365, fol. 1094).

And in point nineteen, under the head of "Powers of this Court in Cases of Fraud," in the last paragraph, page 372 of Volume 7:

"We see no reason why this Court may not undo the injustice which has been perpetrated in this case, defeat the scheme intended to evade the act of 1860, set aside the alleged set-

tlement and releases as transactions which equity cannot sanction, and direct the distribution of this great residuary estate among those to whom it rightfully belongs."

The judgment was affirmed in the Court of Appeals (see Remittitur, p. 412, Vol. 7 of the Record). The opinion of the Court, by VANN, J., is printed in Volume 4, Appendix of Exhibits, at page 70. At page 73, he says:

> "We are of the opinion, therefore, that where the decision of the Special Term does not state the facts found, and the judgment entered thereon has been affirmed by the General Term upon an appeal to this Court, all the facts alleged in the complaint, warranted by the evidence, and necessary to support the judgments below, are presumed to have been found; hence, upon such an appeal we have no more control over the facts than we have when specific findings are made by the Special Term and affirmed by the General Term.
>
> "This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin in procuring the releases out of the case, for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law. Assuming that there was evidence enough to warrant the inference of fraud, there was also ample evidence to warrant the inference there was no fraud. A question of fact was thus presented which is beyond our power of review. The only ground upon which it is claimed that the alleged fraud was so conclusively proved as not to involve a question of fact is, that the residuary legatees did not state that there was a secret trust in favor of the colleges named in the ninth article of the will, and that the effect of that trust was

to vest the bulk of the residuary estate in the widow and next of kin. What are the facts? The residuary legatees were engaged in settling a law suit with hostile parties, toward whom they sustained no fiduciary relations, and who were represented by counsel of the highest standing and ability. Substantially all the material facts had been disclosed by the evidence taken during the trial, in which both parties to the releases were then engaged. The residuary legatees had been examined at length upon the witness stand *by counsel for the widow and next of kin*, who had ample opportunity to make full discovery. While they took the position to which they still adhere, that the gift to them was absolute, that position was not acquiesced in by the widow and nieces, for their counsel openly claimed and argued in the Surrogate's Court that there was a secret trust which was invalid, and that their clients were entitled to the residuary estate. While there may have been concealment of opinions, there was no concealment of facts upon which those opinions were based. The residuary legatees were not bound to volunteer their opinions, even if they then thought there was a secret trust. One who is trying to settle litigation has a right to keep his opinion on the merits to himself. The controversy as to whether there was a secret trust or not, as well as the contest over the probate of the will, was fairly covered by the terms of the releases so far as the parties to those instruments were concerned. They dealt with each other at arm's length as adversary parties, knowing the substantial facts, and they are presumed to have had them in mind when the releases were executed, and to have covered by the language used all questions to which those facts could give rise. Even if we hold, when we reach the question, that there was a secret trust, that will not convict the residuary legatees of fraud in claiming the contrary before the Surrogate,

for one who neither withholds nor misstates the facts cannot be adjudged guilty of fraud simply because the courts finally decide the law to be other than he claimed it to be while engaged in litigation over the subject. Such a rule would make nearly every unsuccessful litigant guilty of fraud.

"From this statement it is obvious that there was no such concealment as would require the Court, if the trial were before a jury, to direct a verdict on the basis of fraud proved beyond question.

"Our conclusion is, that the executors of the widow and the nieces have no standing upon this appeal."

Chief Judge CHARLES ANDREWS, in a dissenting opinion, holds that there was a secret trust and that by virtue of it and of the deed of gift from Bulkley, Ritch and Vaughan, and the releases of the widow and next of kin, the donees under the deed of gift are entitled to the residuary estate, and concludes his opinion as follows:

"I think the judgments below are erroneous, and that the donees under the deed of gift are entitled to the fund" (Vol. 4 of Record, p. 112, fol. 221).

The opinions of the Court of Appeals will also be found in Amherst v. Ritch, 151 N. Y., 282.

Motion to Amend Remittitur.

After the Court, at the request of the plaintiffs herein, had examined the evidence and expressed the opinion that there was no fraud, counsel for the plaintiffs herein, Fayerweather and Achter, for the first time raised the objection that the Trial Judge had not considered the question of fraud in

the releases, and in March, 1897, the plaintiff herein, John B. Reynolds, as executor of Lucy Fayerweather, by William Blaikie, his attorney, made a motion in the Court of Appeals to amend the remittitur in said case so as to direct Judge Truax, the Trial Judge, to consider the evidence given before him at said trial concerning the agreement and the releases made by the widow and next of kin, the law bearing upon said evidence, and to pass upon the same and determine if said releases were valid and binding, and for further relief.

The motion was made upon an order to show cause, dated January 28, 1897, notice of motion and affidavit of William Blaikie, sworn to February 17, 1897, and was denied by order dated March 9, 1898. Said papers are printed in Volume 7 of the Record herein, pages 414 to 461.

After final decision in the Court of Appeals, a reference was had before Charles W. Dayton, Referee named in the judgment of Judge Truax. The Referee made a report (see Report, Vol. 7, p. 464).

Exceptions to this report were filed by John B. Reynolds, as executor, Mary W. Achter and Emma S. Fayerweather (see same, Vol. 7, p. 481).

Final Judgment.

Upon this report a final judgment was entered, dated July 6, 1897, after settlement of the decree, upon notice to, and opportunity to be heard, and upon a ~~dual~~ full hearing by counsel for the widow's executors and next of kin (see Testimony of James L. Bishop, Vol. 3 of Record, pp. 541, 543).

This final judgment was served upon the attorneys for the widow's executors and next of kin, with notice of entry (see Testimony of Bishop, p. 545, Vol. 3, Transcript of Record). The judgment

is printed at page 508 of Volume 7 of the Record. *No appeal has been taken by the widow's executors and next of kin from that final judgment.*

This decree directs final distribution of the entire residuary estate, and in the ninth paragraph thereof provides as follows:

> "It is further adjudged and decreed that upon payment being made by the said Ritch, Bulkley and Vaughan of the various sums hereinbefore directed to be paid by them in the manner hereinbefore provided, the said Ritch, Bulkley and Vaughan, from and after the making of the said payments, be, and they are hereby discharged from all obligation to each of the parties to this action respecting the moneys so paid, and from any obligation to account for the same" (Vol. 7 of Record, p. 523).

The time to appeal from this final decree has long since expired.

PROCEEDINGS IN THE CASE AT BAR.

Bill of Complaint.

On June 20, 1897, this suit was begun by Emma S. Fayerweather and Mary W. Achter, two nieces of Mr. Fayerweather, by the filing of the original bill of complaint. The amended bill was filed February 20, 1899. The parties who were before the Court in Amherst v. Ritch were also parties plaintiff and defendant, to the bill. The bill of complaint set out the residence of the different parties, thereby showing diverse citizenship in the plaintiffs, Fayerweather and Achter, and certain defendants. The complaint then set up the proceedings in the suit of Amherst College v. Ritch, and annexed copy

of the bill of complaint and a copy of the answer of Fayerweather and Achter filed in that suit.

The complainants further allege the trial of that suit, and claim, that, by virtue of the failure of Judge Truax to decide the question of fraud in the giving of the releases, they were denied due process of law, and claim that the decision and judgment and all the proceedings were void.

They further allege subsequent appeals to the General Term and Court of Appeals and the decisions of those Courts affirming the judgment, the application or motion to amend the remittitur, and the determination upon the same; they allege the death of Mr. Fayerweather, leaving a last will and testament with five codicils thereto, the will dated October 6, 1884, the codicil dated December 13, 1884, the codicil dated January 7, 1888, the codicil dated March 19, 1889, a fourth codicil executed on the 11th of November, 1890, which complainants state they are unable to annex, and a fifth codicil dated the 15th of November 1890; the admission of the will to probate, and the subsequent admission of the four codicils to probate, not including the codicil alleged to have been made on the 11th of November, 1890, and the issuance of letters testamentary to Messrs. Bulkley, Ritch and Vaughan.

The complainants further allege:

> **"That it was the intention and purpose of said Daniel B. Fayerweather to devote the principal part of his estate, upon his death, to several institutions of learning mentioned in the ninth paragraph of said will, and he attempted to accomplish the said purpose by the execution of the said will whereby, after making certain definite pecuniary legacies, he gave to each of said institutions specific sums as legacies, and gave all the rest, residue and remainder of his estate to his executors therein named in trust, etc."**

(Vide Vol. 1, p. 12, Record.)

That said bequest to Bulkley, Ritch and Vaughan was made upon a secret trust; that said trust was void.

The complainants then set out the contest in the Surrogate's Court and the releases, and claim that said releases were void on account of fraud; and it is charged that the decrees of the Surrogate's Court are fraudulent and void and should be set aside, and that the complainants should be relieved therefrom and restored to all that they have lost by reason thereof, and that the Circuit Court should, in lieu thereof, establish and compel due performance of the true and lawful last will and testament of Daniel B. Fayerweather, according to law.

It is further claimed that the judgment of the Supreme Court is a cloud upon the title and should be removed, because essential and material issues were not determined therein. It is further claimed that this judgment is not a bar.

Thus, by the amended bill of complaint, the complainants, Fayerweather and Achter, seek to obtain their share, as heirs at law, of the residuary estate of Daniel B. Fayerweather, and to that end, attack the probate of the will and codicils and the judgment of the State Court in Amherst College v. Ritch, and ask performance of the true and lawful last will and testament of Daniel B. Fayerweather, without setting out what this will is (Vide Amended Complaint, Vol. 1, p. 1 of Record).

The Reynolds Cross-bill.

On February 9, 1899, John B. Reynolds, as sole executor of the last will and testament and codicil of Lucy Fayerweather, deceased, filed his cross-bill (Vide Cross-bill, p. 262, Vol. 1 of Record).

The parties to the cross-bill, either complainants or defendants, are the same as the parties to the

bill, except that the cross-bill makes as additional defendants *Joshua M. Fiero and the Randolph and Macon College.* This cross-bill, at page 266, says:

> "The object of said bill of complaint is to secure the payment to complainants and others, including your orator, upon the grounds therein stated, of the residuary estate of Daniel B. Fayerweather, deceased, amounting to about $3,100,000, and to obtain a decree for the cancellation of certain releases and the avoidance of certain decrees of the Surrogate's Court of the County of New York, and of certain judgments of the Supreme Court of the State of New York as colorable clouds upon the title to said residuary estate of said complainants and others."

It alleges residence of parties, showing diverse citizenship between the complainants, John B. Reynolds, a resident of New York, and Emma S. Fayerweather and Mary W. Achter; alleges title of the plaintiff as executor of Mrs. Fayerweather's will; sets out the decrees admitting the will and four codicils of Mr. Fayerweather to probate; alleges that said decrees were fraudulent; that the settlement and releases were fraudulent; and asks that the decree admitting the will and codicils to probate be declared null and void; and alleges that the legal effect of the will, Exhibit "A," as to one-half of the estate, is in violation of the statute, and that it, to that extent passed, on the death of Mr. Fayerweather, to his widow and next of kin.

Thus the plaintiff in the cross-bill attacks the probate of the will of 1884 and the codicils thereto, and asks that the same be set aside and that a prior will of 1880 be probated and established as the will of Mr. Fayerweather.

To the amended bill and the cross-bill, the defendants, Bulkley, Ritch and Vaughan, the colleges named in the ninth article of the will, and North

Western University, filed special pleas setting up the judgment in Amherst v. Ritch as a bar (Vide Plea, p. 191 and p. 206, Vol. 1 of Record).

These pleas further allege, as part of the plea of *res adjudicata,* the affirmance of the judgment in the General Term and Court of Appeals, the motion in the Court of Appeals to amend the remittitur and the order denying same, and the final judgment in the action. The pleas are accompanied by an answer denying the allegations of fraud.

Upon final hearing before Judge Lacombe the pleas to the bill and cross-bill were sustained, and said amended bill and cross-bill were dismissed upon the merits on the ground that

> "the cause of action alleged in the said bill and that alleged in the cross-bill were barred by an adjudication in a prior litigation between the same parties or their predecessors or privies, to wit: by the judgment in an action in the Supreme Court of the State of New York wherein the trustees of Amherst College and others were plaintiffs, and Thomas G. Ritch and others were defendants" (Vide Decree, Vol. 4, p. 777 of the Record and p. 783 thereof).

The complainants and the cross-complainant have appealed directly to the Supreme Court (Vide Notices of Appeal, Vol. 4 of Record, p. 840 and p. 857).

The complainants in the bill have filed sixty-five assignments of error (Vide Assignments of Error of Emma S. Fayerweather and Mary W. Achter, p. 784, Vol. 4 of Record).

Reynolds, the complainant in the cross-bill, has filed sixty-four assignments of error (Vide Assignments of Error of John B. Reynolds, p. 811, Vol. 4 of Record).

The order allowing the appeal of the plaintiffs in the bill is as follows:

> "The foregoing appeal is hereby allowed Oc-

tober 15, 1903, for the review of the questions set forth in the assignments of error filed herewith, as well of jurisdiction as otherwise.

E. Henry Lacombe,
U. S. Circuit Judge."

The same order is made in the appeal of Reynolds in the cross-bill.

The Fiero Cross-bill.

In September, 1891, Joshua M. Fiero filed a cross-bill (Vide same, Vol. 1 of Record, p. 328).

Fiero was not a party to the original bill. He was introduced as a party to the cause by the Reynolds cross-bill. No leave had been asked or granted to file a cross-bill by him.

In this cross-bill he sets up a will made by Mr. Fayerweather on October 2, 1880, appointing said Fiero as executor, a copy of which will is attached to the cross-bill, and asks that said will of October 2, 1880 be proved.

He further alleges that, if said will is lost and cancelled and cannot be established, another will dated the 9th day of August, 1878, wherein said Fiero was appointed executor, and a copy of which will is annexed to his cross-bill, is the last will and testament of Mr. Fayerweather, and asks that the same be established.

The cross-bill further attacks the will of October 6, 1884, and the codicils thereto, and the decrees admitting the same to probate, and asks that the will of 1880, or in the alternative, that of 1878, be established as the last will and testament of Daniel B. Fayerweather.

By order dated January 17, 1902, and upon motion of defendants, this Fiero cross-bill was dismissed and striken from the files of the court upon the ground that the United States Circuit Court

had no jurisdiction to grant the relief prayed for in said bill (Vide Notice of Motion and Order, pp. 343 and 345, Vol. 1 of Record).

From the order dismissing the bill no appeal has been taken.

ARGUMENT.

POINT I.

This Court has no jurisdiction to entertain this appeal.

The Judiciary Act of March 3rd, 1891, 26 U. S. Stat., at large, Chapter 517, page 826;
Mexican Central Railway Company v. Eckman, 187 U. S., 429;
O'Niel v. U. S., 190 U. S., 36;
Blythe v. Hinkley, 173 U. S., 501;
Bache v. Hunt, 193 U. S., 523;
U. S. v. Rider, 163 U. S., 132;
Smith v. McKay, 161 U. S., 355;
Blythe v. Blythe, 172 U. S., 644;
Louisville Trust Co. v. Knott, 191 U. S., 225;
Huntington v. Laidley, 176 U. S., 668;
Arkansas v. Schlierholz, 179 U. S., 598;
Shields v. Coleman, 157 U. S., 177;
Cosmopolitan Mining Co. v. Walsh, 193 U. S., 460;
Robinson v. Caldwell, 165 U. S., 359;
Filhiol v. Torney, 194 U. S., 356;
Barney v. City of New York, 193 U. S., 430; advanced sheets, April 15th, 1904;
West v. Louisiana, 194 U. S., 258.

The authority of this Court to review the action of the Court below must be found in one of two classes of cases, in which, by Section 5 of the Judiciary Act of March 3rd, 1891, an appeal or writ of error may be taken from the Circuit Court direct to this Court. These two classes of cases are as follows:

(1) Cases in which the jurisdiction of the Court is in issue, in which class of cases the question of jurisdiction alone is to be certified from the Court below for decision.

(2) Cases involving the construction or application of the Constitution of the United States.

Unless this case can be brought within one or the other of these two classes, the appeal must fail and be dismissed.

First: **The jurisdiction of the Circuit Court was not in issue in the Court below. The decision of the Court did not rest upon the ground that the Circuit Court as a Federal Court did not have jurisdiction to hear and determine the cause; on the contrary, the Court assumed jurisdiction in giving effect to the judgment of the State Court in Amherst v. Ritch.**

It cannot be said that the jurisdiction of the Circuit Court was in issue upon the issues raised by the special pleas of the defendants to the bill and cross-bill. These special pleas did not deny the jurisdiction of the United States Circuit Court as a Federal Court. They set up as a bar the judgment of the New York Supreme Court in Trustees of Amherst College v. Ritch and others. No where in any of these pleas is the jurisdiction of the Circuit Court denied as a Federal Court. Nor did the final judgment dismiss the bills upon the ground that the Court did not have jurisdiction. On the

contrary, it was expressly determined that the Court had jurisdiction.

(See Final Decree dismissing bill and cross-bill, Vol. 4, p. 777 of Record.

This decree at page 782 recites:

"And the Court, after due advisement, held "and decided that the cause of action alleged "in said bill and that alleged in the cross-bill "were barred by an adjudication in a prior liti- "gation between the same parties or their pred- "ecessors or privies, to wit: by the judgment in "an action in the Supreme Court of the State "of New York wherein the Trustees of Amherst "College and others were plaintiffs and "Thomas G. Ritch and others were defendants, "the complainants and cross-complainant hav- "ing objected to the introduction in evidence "of the record thereof, having moved to strike "it from the record herein and to ignore and "disregard said judgment, on the ground that "the State of New York has, by said judgment, "as an adjudication of the matters herein, each, "all or any of them, deprived them and each "of them of property without due process of "law, and has denied to them and each of them "the equal protection of the law, whereby said "judgment as such adjudication is null and "void, and said complainants having in their "original bill prayed that said judgment should "be treated as null and void for said reasons, "and each and all of said objections, conten- "tions and motions having been by the Court "overruled and denied, and the Court having "held and decided that said judgment is valid, "notwithstanding said objections, as and for "the purpose alleged in said pleas, * * * "Ordered, Adjudged and Decreed that the said

"pleas to the said amended bill, and each of "them be and the same hereby are and each "of them hereby is sustained, and that the same "amended bill be and the same hereby is as to "said defendants dismissed."

(Here follows similar provisions dismissing cross-bill.)

In Bache v. Hunt, 193 U. S., 523 (Supreme Court Reporter, Vol. 24, p. 547, decided April 4th, 1904), it was held that a suit, in which the jurisdiction of the United States Circuit Court was only questioned under the established rules governing courts of the concurrent jurisdiction as between themselves, does not involve a question of jurisdiction, which, under the act of March 3rd, 1891, may be certified directly to the Federal Supreme Court.

In this case Chief Justice Fuller said (p. 525):

"It will be perceived that the jurisdiction of "the Circuit Court was only questioned in re- "spect of its general authority as a judicial trib- "unal and not in respect of its power as a "court of the United States. The established "rules of practice as to bringing in parties to "ancillary or *pro interesse suo* proceedings and "those governing courts of concurrent jurisdic- "tion as between themselves were alone in- "volved. It is settled that the question of ju- "risdiction, which the act of March 3rd, 1891, "provides may be certified to this Court direct- "ly, must be one involving the jurisdiction of "the Circuit Court as a Federal Court."

Citing

Louisville Trust Co. v. Knott, 191 U. S., 225;

Blythe v. Hinkley, 173 U. S., 501.

The appeal was dismissed.

In Blythe v. Hinkley, 173 U. S., 501, the precise question was determined in favor of the contention which we make here. In that case it appearing from the opinion of the Circuit Judge that the various bills in the case were dismissed on the grounds:

(1) That the jurisdiction of the Circuit Court could not be maintained because the State Court, in the exercise of its general jurisdiction, determined the eligibility of the defendant Florence Blythe to inherit an estate which that Court was called upon to distribute under the laws of the state, and that other propositions contended for by complainants were, for the same reason, deemed insufficient to take this case out of the general rule that, after a court of a state with full jurisdiction over property in its possession has finally determined all rights to that property, a court of the United States will not entertain jurisdiction to annul such decree and disturb rights once definitely determined, and

(2) That the remedy of the complainants, if any, was at law and not in equity; held as neither ground went to the jurisdiction of the Circuit Court as a court of the United States, the appeal could not be sustained as within any class mentioned in Section 5 of the Judiciary Act of 1891, and if error was committed, this was not the proper mode of correcting it.

In this case Chief Justice FULLER, writing the unanimous opinion of the Court said, at page 506:

> "We have heretofore determined that review "by certificate is limited by the Act of March "3rd, 1891, to certificates by the Circuit Courts "made after final judgment of a question in "issue as to their own jurisdiction, and certi- "ficates by the Circuit Court of Appeals of

"questions of law in relation to which the "advice of this Court is sought."

Citing

U. S. v. Rider, 163 U. S., 132.

"Appeals or writs of error may be taken "directly from the Circuit Courts to this Court "in cases in which the jurisdiction of those "Courts is in issue, that is, their jurisdiction "as Federal Courts, the question alone of juris- "diction being certified to this Court. The "Circuit Court held that the remedy was at "law and not in equity. That the conclusion "was not a decision that the Circuit Court "had no jurisdiction as a court of the United "States."

Citing

Smith v. McKay, 161 U. S., 355;
Blythe v. Blythe, 172 U. S., 644.

"The Circuit Court dismissed the bills on "another ground, namely, that the judgments "of the State Court could not be reviewed by "that Court on the reasons put forward. This "also was not in itself a decision for want of "jurisdiction because the Circuit Court was a "Federal Court, but a decision that the Cir- "cuit Court was unable to grant relief because "of the judgments rendered by those other "Courts. If we were to take jurisdiction on "this certificate, we could only determine "whether the Circuit Court had jurisdiction as "a court of the United States, and as the decree "rested on no denial of its jurisdiction as such, "but was rendered in the exercise of that juris- "diction, it is obvious that this appeal cannot "be maintained in that aspect. * *

"The Superior Court of San Francisco was

"a court of general jurisdiction and authorized
"to take jurisdiction 'of all matters of probate,'
"and the bill averred that Thomas H. Blythe
"died a resident of the City and County of
"San Francisco, and left an estate therein, and
"that Court repeatedly decreed that Florence
"was the heir of Thomas H. Blythe and its
"decrees were repeatedly affirmed by the
"Supreme Court of the State. So far as the
"construction of the State Statutes and State
"Constitution in this behalf by the State courts
"was concerned, it was not the province of the
"Circuit Court to re-examine their conclusions.
"* * * It is enough for the present purpose
"that the State courts had concurrent jurisdic-
"tion with the Circuit Courts of the United
"States to pass on the Federal questions thus
"intimated, for the Constitution, Laws and
"Treaties of the United States are as much a
"part of the laws of every State as its own
"local laws and Constitution, *and if the State*
"Court erred in judgment, it was mere error
"and not to be corrected through the medium
"of bills such as those under consideration."

The appeal was dismissed.

In Louisville Trust Co. v. Knott, 191 U. S., 225, the appeal was dismissed. Mr. Justice Harlan, writing the opinion of the Court quotes (p. 235) with approval from the opinion of the Court in Blythe v. Hinkley, 173 U. S., above. This case contains a full and exhaustive review of the cases bearing upon the question of the jurisdiction of this Court to review judgments of the Court below upon the question of jurisdiction.

In Huntington v. Laidley, 176 U. S., 668, the question whether proceedings concerning the legal or equitable title in the land, begun and concluded in the State courts, before the commencement of the

suit in the Circuit Court of the United States to charge the land with a trust, afford a defence to this suit, is not a question affecting the jurisdiction of that Court, but a question affecting the merits of the cause, and as such to be tried and determined by that Court in the exercise of its jurisdiction, and if that Court of its own motion, without hearing and passing on the question of its jurisdiction, enters a final decree dimissing the suit, under the Act of March 3, 1875, Chapter 137, Section 5, upon the ground that by reason of the proceedings in the courts of the State, the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, and an appeal is taken to this Court upon the question of jurisdiction only, under the Act of March 3, 1891, Chapter 517, Section 5, the decree must be reversed and the cause remanded for further proceedings.

At page 679 the Court in its opinion, commenting on the decision in Blythe v. Hinkley, says:

> "The case of Blythe v. Hinkley, 173 U. S., "501, cited by the appellees, has no tendency "to support the opposite conclusion. In that "case, this Court dismissed the appeal, because "the decree was not founded solely upon a want "of jurisdiction in the Circuit Court of the "United States, but also upon the grounds "that the plaintiff's remedy was at law and "not in equity, *and that certain judgments of "the State courts could not be reviewed on the "reasons put forward. And of the last ground "this Court, speaking by the Chief Justice, said "that it was not in itself a decision of want of "jurisdiction because the Circuit Court was a "Federal court, but a decision that the Circuit "Court was unable to grant relief because of "the judgments rendered by those other "Courts."*

In Arkansas v. Schlierholz, 179 U. S., 598, Mr. Justice WHITE delivering the opinion of the Court, says at page 600:

> "It was said in Huntington v. Laidlay, 176 "U. S., 668 (at page 676): 'In order to main- "tain the appellate jurisdiction of this Court "under this clause, the record must distinctly "and unequivocally show that the Court below "sends up for consideration a single and "definite question of jurisdiction. This may "appear in either of two ways; by the terms of "the decree appealed from and of the order "allowing the appeal, or by a separate certifi- "cate of the Court below.'
>
> "Now, on looking at the proceedings had "prior to the judgment rendered below, we do "not find even a suggestion that the issue was "made and decided by the District Court as "to the jurisdiction of that Court to hear and "determine a controversy presented by a peti- "tion in *habeas corpus* and the return thereto. "On the contrary, the defence set forth in the "return went simply to the merits, being based "upon the contention that Schlierholz, in the "acts charged in the indictment, had acted "outside of his instructions and contrary to "law. * * * The statements in the order "allowing the appeal, setting forth the ques- "tion propounded for the decision of this "Court, whether considered by themselves or "in connection with the record, cannot in "reason be treated as 'a plain declaration of a "single matter which is by the record sent up "to this Court for decision as a question of "jurisdiction.'"

Citing

Shields v. Coleman, 157 U. S., 177.

As declared in the case just cited, no mere suggestion that the jurisdiction of the Court was in issue will answer.

In Mexican Central Railway Company v. Eckman, 187 U. S., 429, it was held that the jurisdiction referred to in the first sub-division of the first section of the judiciary act of March 3, 1891, is the jurisdiction of the Circuit and District Courts as such, and when a case comes directly to the Court under that sub-division the question of the jurisdiction alone is open for examination.

In O'Neil v. U. S., 190 U. S., 36, it was held that the language of Section 5 of the Judiciary Act of March 3, 1891—"Cases in which the jurisdiction of the Court is in issue"—means where the power of the Circuit and District Court of the United States to hear and determine is denied.

In Barney v. City of New York, 193 U. S., 430, it was held:

> "Where the jurisdiction of the Circuit Court "is invoked on the ground of deprivation of "property without due process of law in viola- "tion of the Fourteenth Amendment, it must "appear at the outset that the alleged deprivation was by act of the State.
>
> "And where it appeared on the plaintiff's "own statement of his case that the act com- "plained of was not only unauthorized, but was "forbidden by the State Legislature in ques- "tion, the Circuit Court rightly declined to pro- "ceed further and dismissed the suit."

In this case Mr. Chief Justice FULLER, at page 437, says:

> "Controversies over violation of the laws of "New York are controversies to be dealt with "by the courts of the State. Complainant's

"grievance was that the law of the State had "been broken, and not a grievance inflicted by "action of the Legislature or Executive or "Judicial Departments of the State; and the "principle is, that it is for the State courts to "remedy acts of state officers done without the "authority of, or contrary to State law."

In West v. Louisiana, 194 U. S., 258, this Court held that "The construction of the State Constitution and Statutes and the Common Law on the subject of reading depositions of witnesses in criminal trials is not a Federal question and this Court is bound in such cases by the construction given thereto by the State Court."

And at page 261, Mr. Justice PECKHAM said:

"Whether the State Court erred in its con- "struction of the State Constitution and "Statutes and the Common Law on the subject "of reading depositions of witnesses, is not a "Federal question. *We are bound by the con- "struction which the State Court gives to its "own Constitution and Statutes and to the law "which may obtain in the State, under circum- "stances such as those existing herein.*" * * * "The State of Louisiana had the right to alter "the Common Law at any time, although it "had theretofore adopted it with certain limita- "tions. If, through its Courts, it erred in de- "ciding what the Common Law was, yet, if no "fundamental and absolutely all important "right were thereby denied to an accused, he "still had due process of law and cannot com- "plain to this Court regarding the error, as- "suming of course, that the decision did not "conflict with some specific provisions of the "Federal Constitution."

Second: **This suit is not one which involves the construction or application of the Constitution of the United States, within the meaning of the Judiciary Act of March 3, 1891, authorizing the taking of appeals or writs of error in such cases from District or Circuit Courts of the United States direct to the Supreme Court.**

Cosmopolitan Mining Company v. Walsh, 193, U. S., 460;
Treat Mfg. Co. v. Standard Steel & Iron Co., 157 U. S., 674;
Sloan v. U. S., 193 U. S., 614-620;
Lambert v. Barett, 157 U. S., 697;
Central Land Co. v. Laidley, 159 U. S., 103;
Weber v. Rogan, 188 U. S., 10;
Wilson v. North Carolina, 169 U. S., 586.

The language of the Fourteenth Amendment is in part as follows:

> "Nor shall any state deprive any person of "life, liberty or property without due process "of law."

In Cosmopolitan Mining Company v. Walsh, 193 U. S., 460, decided March 21st, 1904, reported in Supreme Court Advanced Sheets, May 2nd, 1904, it was held that the contention, by a foreign corporation, that the rendition of certain judgments in the State courts sought to be introduced in evidence against it was without due process of law, does not make the suit one involving the construction or application of the Federal Constitution, within the meaning of the Judiciary Act of March 3, 1891, for direct review of a Federal Circuit Court judgment in the Supreme Court, where this claim is based solely upon the theory that, under the circumstances, service of process in the suits in the State Court upon the corporation's designated agent was

unauthorized, either by the State Constitution and laws or the principles of general jurisprudence.

In this case, at page 468, Mr. Justice WHITE says:

"We are asked in this case to review directly "the judgment of the Circuit Court of the "United States, and our right to do so, if at all, "depends on that clause of Section 5 of the "Judiciary Act of 1891, which authorizes the "taking of appeals or writs of error from Dis- "trict or Circuit Courts direct to this Court "'in any case that involves the construction "or application of the Constitution of the "United States.'

"Of course, if the case at bar does not merely "involve the construction or application of the "Constitution of the United States, in the "sense in which that phrase is employed in the "Judiciary Act of 1891, we are precluded from "examining the merits upon this writ of error. "In order to determine whether the case is one "which should have gone to the Circuit Court "of Appeals and not have been brought di- "rectly to this Court, we must look into the "record without regard to the certificate given "by the Trial Judge. Indeed, we know of no "authority for the making of such certificate.

"In Carey v. Houston and T. C. R. Co., 150 "U. S., 170, the record exhibited the following "controversy:

"Stockholders of the railroad company filed "a bill in equity in the Circuit Court of the "United States, praying, among other relief, "the setting aside of a certain decree of fore- "closure and sale, passing the claim upon the "grounds of collusion and fraud and want of "jurisdiction in the Court which had entered "the decree. A final decree was entered in the "cause dismissing the bill and appeals were

"allowed both to the Circuit Court of Appeals "and to this Court. The appeal to this Court "was based upon the contention that the cause "involved not only the question of jurisdiction "of the Court below, but also the question of "the construction and application of the Con- "stitution of the United States. The appeal "was dismissed, and in the course of the "opinion, speaking through Mr. Chief Justice "Fuller, it was said (pp. 179-181):

"'It is argued that the record shows that "complainants have been deprived of their "property without due process of law, by means "of the decree attacked, but because the bill "alleged irregularities, errors and jurisdic- "tional defects in the foreclosure proceedings, "and fraud in respect thereof, and in the subse- "quent transactions which might have enabled "the railroad company upon a direct appeal to "have avoided the decree of sale, or which, if "sustained on this bill, might have justified the "Circuit Court in setting aside their decree, it "does not follow that the construction or appli- "cation of the Constitution of the United "States was involved in the case in the sense "of the statute. In passing upon the validity "of that decree the Circuit Court decided no "question of the construction or application "of the Constitution, and, as we have said, no "such question was raised for its consideration. "Our conclusion is that the motion to dismiss "the appeal be sustained.'"

Mr. Justice WHITE also cites from the opinion of the Court *In re.* Lennon, 150 U. S., 393 at 400, and concludes (p. 471):

"It was obvious, under the construction of "the Judiciary Act of 1891, announced in the "cases just referred to, that this cause does not

"involve the construction or application of the "Constitution of the United States, and there- "fore was not entitled to be brought directly "to this Court from the Circuit Court of the "United States."

It is impossible to distinguish the decision of this Court in *Cosmopolitan Mining Co.* v. *Walsh* from the case at bar. In that case, as appears from the report of the case and the opinion of Mr. Justice White, the property of the Mining Company, the plaintiff, had been sold on judgment and execution. Walsh, the defendant, was the purchaser of the property so sold. The plaintiff, the Mining Company, brought suit against Walsh to recover possession of the real property alleged to have been sold under the judgments against the plaintiff. As in the case at bar, diversity of citizenship of the parties was alleged in the complaint, and the property in controversy was averred to exceed $2,000 in value. The answer of the defendant set up as special defences the proceedings in the courts in which the judgments were rendered, and the proceedings by which the title to the property in dispute was claimed to be vested in Walsh, the defendant. A replication and an amended replication were filed to defendant's answer, in which it was contended by the plaintiff, that, in the actions in which the judgments had been rendered, no service of process had been made; that the Colorado courts acted without jurisdiction, and that consequently *"the plaintiff had been and is deprived of its property, namely, the property sought to be recovered in this action, without notice, hearing, opportunity to be heard or due process of law, and in violation of the Fourteenth amendment of the Constitution of the United States."*

Upon the trial, the defendant offered in evidence the judgment record in the various actions relied upon. Objection was made to the admissibility in

evidence of the judgment record, substantially, among others, that, as there was then no evidence of personal service on the corporation, through its agent, the mere levy of a writ of attachment was insufficient to confer jurisdiction and to authorize the Court to enter judgment and direct a sale of the property, and these objections, *it was insisted, established that the judgments recovered against the corporation were rendered without due process of law in violation of the Constitution of the United States.* The objections were overruled. *A verdict was directed for the defendant.* A writ of error from the Supreme Court was allowed by the Trial Judge, who made and signed a certificate reciting:

> *"That in the pleadings in this action, as well as in the rulings of this Court in admitting and refusing to admit evidence,* and in giving and refusing to give instructions to the jury, as set forth in the assignments of error hereto annexed, *there was involved the application and construction of the Constitution of the United States,* namely, of part of the fourteenth amendment of the same, which provides for *due process of law."*

It will thus be seen that, in this case, the constitutional question was presented in time, and was raised by the pleadings; by objection to the admission of the judgments and decree in evidence, and by the plaintiff in error's motion for a directed verdict, and the Judge of the trial has certified that it was involved in the trial of the case.

At page 472 Justice WHITE further says:

> "The primary and fundamental contention of the Mining Company was, therefore, this and nothing more: that under the circumstances disclosed the service upon the statutory agent was unauthorized either by the law of Colorado or the principles of general law, and hence that it had not lost its title to the prop-

> erty. The claim asserted under the Constitution of the United States was, therefore, merely conjectural and amounted to this only, that under the law of Colorado or under the general law the service on the alleged agent was void, that it would be a violation of the Constitution of the United States to give effect to judgments based on such service * * *. This, however, as we have already shown, amounts but to the concession that the substantial controversy which the case presented involved the mere determination of what was the law of Colorado upon the subject. The rulings of the Court below as to the admissibility of evidence, and its final direction of a verdict involved necessarily deciding that the service upon the agent was valid by the law of Colorado, or the principles of general law applicable thereto, and its action in so doing in nowise involved the construction or application of any provision of the Constitution of the United States."

The writ of error was dismissed.

Applying the reasoning of this case to the case at bar, it is apparent that the substantial controversy which the case at bar presented, involved the mere determination of what was the law of the State of New York upon the subject, and that the rulings of the Court below as to the admissibility in evidence of the judgments of the State Court in *Amherst* v. *Ritch,* and its final decision, involved necessarily that the judgment of the State Court was valid by the law of New York or the principles of general law applicable thereto, and its action, in so doing, in no wise involved the construction or application of any provision of the Constitution of the United States.

It is impossible to perceive the application of the Fourteenth Amendment to the facts of this case beyond its utilization as a method of procedure or review. The mere assertion by the plaintiffs of

constitutional questions, or that they have been deprived of their property without due process of law, does not establish jurisdiction, otherwise every defeated litigant in a State Court action could, in the event of diverse citizenship of the parties, bring an action in the United States Federal Court, and upon his allegation respecting due process of law and the Fourteenth Amendment, secure a review of the whole record upon an appeal directly to this Court.

Newburyport Water Co. v. Newburyport, 193 U. S., 561-576, and cases cited.

In *Maynard* v. *Hecht,* 151 U. S., 324-326, it was held that where the question of jurisdiction of the Circuit Court has been decided, that question alone can go to the Supreme Court, or the whole case may be taken to the Circuit Court of Appeals. The election must be made by the appellant.

In Blythe v. Hinkley, 173 U. S., 501, from which we have heretofore quoted, the Court said, on page 507:

> "Nor can we take jurisdiction on the ground "that the case involved the construction or ap- "plication of the Constitution of the United "States, or that the validity or construction of "the treaty was drawn in question, or that the "Constitution or law of a state was claimed to "be in controvention with the Constitution of "the United States, within the meaning of the "Judiciary Act of March 3, 1891. * * * The "Circuit Court by its decree passed on none "of these matters, unless it might be said that "they were indirectly involved in the holding "of the judgments of the State Court to be a "Bar. * * * Even if the decree had been "based solely on the binding force of the State "judgment, still we cannot hold that an ap- "peal directly to this Court would lie."

Third: **No question can be raised by the appellants, Fayerweather and Achter (complainants in the bill), and John B. Reynolds, as executor of Mrs. Fayerweather (complainant in the cross-bill), as to the order of the Court dismissing the cross-bill filed by Joshua M. Fiero. They are not parties aggrieved; they did not file the bill; no appeal has been taken by Fiero; he is the only person who could be heard against that order of the Court; he has acquiesced.**

The Stephen Morgan, 94 U. S., 599;
Bolles v. *Outing Co.,* 175 U. S., 262, and cases cited.

This cross-bill of Joshua M. Fiero is printed at page 328, Volume 1 of the Record. The order of the Court dismissing said bill is at page 345, Volume 1 of the Record. Fiero was not a party to the original or amended bill. He first became a party in the Reynolds cross-bill (Vide Cross-bill, Vol. 1, p. 328 of Record).

The object of his cross-bill was to establish a will of Mr. Fayerweather, dated October 2, 1880, in which he was named as an executor; or, in case said will of 1880 was lost or cancelled or not to be established for any reason, then that a will made by Mr. Fayerweather on August 8, 1878, be established and proved as the will of Mr. Fayerweather. This cross-bill further seeks to set aside the will of October 6, 1884, and the codicils thereto and the probate thereof.

Upon the filing of this cross-bill by Fiero, a motion was made by the defendants to strike said cross-bill from the files of the Court. This motion was granted upon the sole ground that the United States Circuit Court has no jurisdiction to grant the relief prayed for in said cross-bill.

That the United States Circuit Court has no jurisdiction to set aside a will admitted to probate and establish another and a different will as a test-

mentary act is clearly established in the following cases:

Case of Broderick's Will, 21 Wall, 503;
Simmons v. *Saul*, 138 U. S. 439 at p. 459;
Fouverqne v. *City of New Orleans*, 18 How. (U. S.), 470, at p. 473;
Langdon v. *Goddard*, 2 Story, 267;
Wahl v. *Franz*, 100 Fed. Rep., 680;
Tarver v. *Tarver*, 9 Peters, 174;
In re Aspinwall Estate, 83 Fed. Rep., 851;
Reed v. *Reed*, 31 Fed. Rep., 49;
Copeland v. *Bruning*, 72 Fed. Rep., 5;
In re Cilley, 58 Fed. Rep. 977;
Oakley v. *Taylor*, 64 Fed. Rep., 245;
In re Frazer, Fed. Cas., 5068, Vol. 9;
Ellis v. *Davis*, 109 U. S., 485;
Carrou v. *O'Callagan*, 125 Fed. Rep., 657 (9th Circuit);
Richardson v. *Green*, 61 Fed. Rep., 423;
Cilley v. *Patton*, 62 Fed. Rep., 498;
Kirby v. *Chic. & N. W. R. Co.*, 106 Fed. Rep., 551;
Byers v. *Macauley*, 149 U. S., 608;
In re Foley, 80 Fed. Rep., 949.

If the jurisdiction of the Federal Court to probate a will is dependent upon the jurisdiction of the Supreme Court of the State of New York to grant such relief, it will be found, upon an examination of the following authorities, that such jurisdiction does not exist in the State courts.

Anderson v. *Anderson*, 112 N. Y., 104;
Delabarre v. *McAlpin*, 71 App. Div., 591.

In Anderson v. Anderson, Judge PECKHAM, expressing the unanimous opinion of the Court, and after a careful review of the Statutes and provisions

of the Code of New York relating to the probate and establishment of wills, says, at page 113:

> "The general policy of this state is and has been to commit to the courts of probate the decision of questions arising upon the due execution of an alleged will, and no well grounded complaint exists, as we believe, in regard to the manner in which that jurisdiction has been exercised."

This action was brought by the plaintiff to establish by a judgment of the Supreme Court the will of John Anderson. The plaintiff was the son of the testator. At page 106, Judge PECKHAM says:

> "The question to be decided is, whether a devisee of the legal estate, being in possession of the property devised, can maintain an action to establish the will against the heir at law."

And in conclusion, at page 116, Judge PECKHAM says:

> "We see nothing in any of the other allegations of the complaint which would give jurisdiction to the Court in this species of action. Upon a careful examination of the whole case we think the General Term was right in holding that the action could not be maintained."

In Delabarre v. McAlpin, *supra,* INGRAHAM, J., expressing the unanimous opinion of the Appellate Division, says, at page 593:

> "If there is in existence a will of the decedent under which these plaintiffs are entitled to her personal property, the usual course would be to present that will to the Surrogate for probate, when the question as to whether or not it was the last will and testament of the deceased could be disposed of in the regular way in the Surrogate's Court. There is no

fact alleged in the complaint which would justify the Supreme Court in accepting jurisdiction in a proceeding to probate a will of the deceased; and while a court of equity has, in special cases, undertaken to determine as to the validity of a will affecting personal property, where there are obstacles which would prevent the Surrogate's Court from passing upon the question, the Supreme Court has always refused to exercise this jurisdiction where the Surrogate's Court has jurisdiction."

In this action it was sought to set aside one will of a testator on the ground of fraud and deceit and undue influence, and to determine which of the two wills of a deceased person should be admitted to probate. In the Appellate Division it was held that a demurrer to the complaint must be sustained on the ground that the Supreme Court had no jurisdiction.

POINT II.

The right, title and interest of the complainants, Fayerweather and Achter, in the bill, and Reynolds, as executor of Mrs. Fayerweather, in the cross-bill, are res adjudicata in respect to the fund constituting the residuary estate, by virtue of the proceedings and decree in the suit of the trustees of Amherst College, et al. v. Ritch, et al.

The decree in that case is an estop-

pel of record on the plaintiffs to bring the present actions, and is conclusive not only as to the matters litigated, but also upon those which might have been litigated in that action. This concludes any question which might be raised by the plaintiffs Fayerweather, Achter and Reynolds, as to a will of 1878, or a will of 1880, or any testamentary papers of Daniel B. Fayerweather, other than the will and codicils of 1884, which were the subject of adjudication in Amherst v. Ritch.

The special pleas of the defendants raised this single question. The judgment of the Circuit Court below dismissed the bill and cross-bill upon this sole ground.

If this Court has jurisdiction of this appeal under the Judiciary Act, it is the only question before it for determination.

The issue is a narrow one, and considered in the light of well established principles respecting the due effect to be given to judgments of courts having jurisdiction of the parties and subject matter of an action, ought not to be difficult of determination.

Where a fact has been put in issue and determined by final judgment, it becomes as between the parties and their privies *res adjudicata,* and is not open to further contestation between the same parties or their privies in a second suit which may involve even a different cause of action.

Where a right, title or question is there put in issue, final judgment or decree therein binds the

parties, both as to all matters actually litigated as well as those which might have been litigated.

The question presented to the Supreme Court of the State of New York in Amherst v. Ritch, was the question which the complainants in the bill and cross-bill seek to have the Federal Court now determine in their favor, to wit, their right, title or interest in the residuary estate of Mr. Fayerweather.

The subject matter of that action was a fund constituting the residuary estate of Daniel B. Fayerweather. There were three sets of claimants, viz.:

First. The colleges named in the ninth clause of the will claimed the fund by virtue of a secret trust, which, they contended, did not come under the operation of Chapter 360 of the Laws of 1860 of New York. They insisted that it was a trust outside of the will and codicils of Mr. Fayerweather. In their complaint they set up the will of 1884, and the four codicils as the testamentary papers of Mr. Fayerweather; the decrees admitting the same to probate, and the releases given by the widow and next of kin, and in the prayer for relief asked that

> "The ultimate rights of the plaintiffs as between them and each of them, and every of the other defendants herein, be determined by the judgment in this action, in accordance with the allegations of this complaint and the prayer hereinbefore contained" (Vide Vol. 5 of Record, p. 26).

Second. Emma S. Fayerweather and Mary W. Achter, and John B. Reynolds, as executor of Mrs. Fayerweather, claimed the fund, and by their answer, set up the will of 1884 and the four codicils and the decrees admitting the same to probate; they claimed that there was a secret trust for the benefit

of the ninth clause colleges; that that trust was in contravention of the act of 1860, Chapter 360 of the laws of New York, and void, and that the releases given by the widow and next of kin were void for fraud and concealment; and in the prayer for relief asked:

> "6th. That the ultimate rights of the parties to this action in the estate of the said Daniel B. Fayerweather be determined and enforced by the judgment in this action in accordance with the allegations of this answer and the foregoing prayer for relief herein" (Vide Answer Fayerweather, Achter and Reynolds, Vol. 5 of Record, pp. 60 and 79).

Third. The donees named in the deed of gift claimed the fund, by virtue of the will of 1884 and the codicils thereto; by the releases of the widow and next of kin; by the decrees admitting the will and codicils to probate, and the deed of gift from the residuary legatees, Ritch, Bulkley and Vaughan.

There was, therefore, a Court having jurisdiction of all the parties (all the parties plaintiff and defendant to that action being parties to these actions, plaintiffs or defendants); jurisdiction of the subject matter of the action, to wit, a fund constituting the residuary estate of the testator; three sets of claimants to that fund, each set of claimants asserting title, but all basing their claim to the fund upon the fundamental proposition that the will of 1884 and the four codicils thereto were the testamentary acts of Daniel B. Fayerweather.

In this state of the case the trial came on in Equity at Special Term in the Supreme Court before Justice Truax. All the parties were represented, Fayerweather and Achter and Reynolds, as executor of Mrs. Fayerweather, by Col. Edward C. James and William Blaikie.

There was a protracted trial. The record of that trial is before this court. It was pleaded by the complainants in their own bill and introduced in evidence in the Court below by the defendants. It will be found in Vol. 5 of the Record and is entitled "Amherst College v. Ritch." This record will disclose that all testimony considered relevant, material and competent by the Court which Fayerweather, Achter and Reynolds tendered was received.

The decision of Judge Truax was handed down in December, 1894. (Vide same, page 265, Record Amherst v. Ritch.) It was a concise statement of the grounds upon which the issues had been decided under Section 1022 of the Code of Civil Procedure then in force in the State of New York. These grounds were as follows:

That the defendants, Ritch and Vaughan, for themselves, and on the part of Bulkley, promised Mr. Fayerweather, and induced him to believe, that if he would make them residuary legatees, they would convert the same into cash and divide the same among the twenty corporations named in the ninth clause of the will dated October 6, 1884, after paying $100,000 to the Northwestern University; that the said testator named the said Ritch, Bulkley, and Vaughan residuary legatees, in the reliance upon said promise, and that they had attempted to dispose of said residuary estate in disregard of said promise; and the decision further directed that judgment be entered upon the issues in the action, that the residuary estate devised to Ritch, Bulkley and Vaughan by the last will and testament and codicils of Daniel B. Fayerweather *was held by them in trust for plaintiffs and the institutions named in the ninth clause of the will,* and for the Northwestern University, in the sum of $100,000, and enjoined the said Ritch, Bulkley and Vaughan from distributing said residuary estate under the deed of gift.

No special findings were made. This was pursuant to the wish of counsel for all parties, including counsel for the widow and next of kin.

Such short form of decision was allowed by Section 1022 of the Code of Civil Procedure as then in force in New York and which was as follows:

Section 1022 *of the Code of Civil Procedure:*

> "The decision of the Court, or the report of a referee upon the trial of the whole issues of fact may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon; or the Court or Referee, in deciding the issues, may file a decision stating concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon, which decision so filed shall form a part of the judgment roll. In an action where the costs are in the discretion of the Court, the decision or report must award or deny costs, and if it awards costs, it must designate the parties to whom the costs to be taxed are awarded. *Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions, the General Term of the (Supreme) Court in which the action is pending shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to.*"

Chapter 360 of the Laws of 1860 of New York was as follows:

> "No person having a husband, wife, child or parent shall, by his or her last will and testament, devise or bequeath to any benevolent,

> charitable, literary, scientific, religious, or missionary society, association or corporation, in trust or otherwise, more than one-half of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more."

In his opinion (p. 1026 record Amherst v. Ritch, Vol. 5 of Record herein) Judge Truax, after reviewing the authorities at great length and applying them to the evidence, reached the conclusion that the residuary estate was left in trust for the colleges, and in respect to the effect of the Act of 1860, concluded that the gift was not within the prohibition of that act, and at page 1054 says:

> "The view that I have taken of the facts and the law of this case renders it unnecessary for me to consider the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather."

Upon the decision a judgment was entered (Vide same page 267 Record, Amherst v. Ritch), adjudging that the residuary estate was held by Ritch, Bulkley and Vaughan in trust for the colleges named in the ninth clause of the will, and the Northwestern University, upon a trust to convert same into cash and divide same among said colleges named in the ninth clause of the will and the Northwestern University. The judgment enjoined Ritch, Bulkley and Vaughan from distributing under the deed of gift, and directed an accounting by them before Charles W. Dayton as referee, *and directed payment of the proceeds of the residuary estate to the twenty colleges named in the ninth clause of the will and to the Northwestern University.*

The Appeal.

Fayerweather, Achter and Reynolds filed a general exception to the decision and appealed to the General Term of the Supreme Court.

The duties and powers of the Appellate Court in the State of New York upon such an appeal have been fully considered and determined in the highest court of that State. The Appellate Court is required to review all questions of fact and law, and may grant such a judgment to either of the parties as the facts warrant without ordering a new trial.

Multz v. *Price*, 91 App. Div., 116;
Johnson v. *O'Connor*, 21 App. Div., 77, affd. 162 N. Y., 639;
Harding v. *Elliott*, 91 Hun, 502;
Bomeisler v. *Forster*, 154 N. Y., 229, at 236.

In the matter of *Health Department* v. *Weeks*, 22 A. D., 110, at 112, it was held that upon a short form decision and appeal under Section 1022 of the Code of Civil Procedure, the whole case was open for direct consideration by the Appellate Division, both on the law and facts; that the grounds of decision are but the reasons which actuated the lower Court in deciding as it did, and they are inserted for the assistance of the Appellate Court—not to control its actions. That the reasons may be statements of facts—general or partial, or they may be argumentative suggestions or mere statements of the Trial Judge's view of the law; *but if these grounds or reasons be insufficient, there may still be ample grounds or reasons justifying the decision, and a decision stating concisely the grounds, without findings, is tantamount, in fact, to the general verdict of a jury.*

To the same effect is

Gardiner v. *N. Y. Mutual Savings and Loan Assn.*, 67 App. Div., 141.

The appeal was heard in General Term, consisting of Chief Justice Van Brunt and associate Justices Follett and Parker, upon a case containing the evidence and exceptions made by Fayerweather, Achter and Reynolds, and other defendants in that action.

Fayerweather, Achter and Reynolds submitted their case upon full argument of counsel and elaborate printed briefs (Vide Brief in Gen. Term, Vol. 7 of Record, pp. 1-196).

No complaint was made of error in the exclusion or admission of testimony, or of failure to consider the issue of fraud in the releases, or that the omission of the Trial Justice to determine that question deprived the parties of a constitutional right and vitiated and destroyed the conclusiveness of the judgment; but it was insisted, that, upon the Record, the General Term should award affirmative relief to said Fayerweather, Achter and Reynolds, and award to them the residuary estate, and that the General Term had power to pursue that course.

The opinion of the majority of the Court was written by Mr. Justice Follett and concurred in by Mr. Justice Parker. These opinions will be found on page 1091 of the Record, Amherst v. Ritch.

In deciding the case, the judges considered the question of fraud in the releases, and decided the same adversely to the appellants, Fayerweather, Achter and Reynolds. This appears not only in the opinion of Judge Follett, but also in the testimony given by Judge Alton B. Parker, which testimony will be found in Volume 3 of the Record of Defendants' Proofs, pages 440-443 and pages 562-574. The opinion of Judge FOLLETT contains the

following paragraph upon the subject of fraud in the releases:

> "The executors of the testator's widow and two of his heirs at law and next of kin seek to have the residuary clause declared invalid under Chapter 360 of the Laws of 1860, which provides (quoting from Act of 1860): The difficulty with their contention is, that the widow and heirs released all their interest in the estate for valuable consideration paid to them. This statute was designed for the protection of husbands, wives, next of kin and heirs at law, but it does not in anywise prevent them from releasing to educational corporations benefits which they might have secured by resisting wills made in contravention of the statute. It is urged that these releases were procured by fraud and undue influence. *There is no evidence in the record justifying this contention.* The terms of settlement were agreed on during the controversy in the Surrogate's Court over the probate of the will and codicils, and the widow and heirs were represented in that controversy and in the settlement by distinguished counsel and acted under their advice. The residuary legatees not having any personal interest in the residuary estate, and the widow and heirs having released their interest therein, there is no person who is entitled to raise the question that the residuary clause is void under the Act of 1860. No person or corporation, except the state in certain cases, can impeach the validity of the disposition of property by will, unless the contestant, if successful, will acquire some interest under the statute of descent or of distribution, or as devisee or legatee, in the property attempted to be disposed of by the will; and if the person entitled to contest a will, or some one or more of its provisions, voluntarily and for a valuable consideration received after the testator's death, with full knowledge of the invalidity

of the will, divests himself of all interest in the property disposed of by it, he cannot impeach its validity. The judgment should be affirmed" (Vol. 5 of Record [Amherst v. Ritch], p. 1113).

In deciding the case the Court considered the alleged question of fraud in the releases, and decided that there was no evidence in the Record to justify that contention (Vide Testimony of Judge Parker, Vol. 3 of Record, p. 443). The testimony of Judge Parker was given under protest by him. He consented to testify only in view of the fact that Judge Truax, the Trial Judge, upon motion of complainants, had given his testimony as to matters considered and determined by him in the court below. It will be seen that the Court, in reaching the conclusion that the judgment should be affirmed, pursued precisely the course suggested and urged by the appellants. Complainants' complaint is that the award was not to them.

From the decision of the General Term, Fayerweather, Achter and Reynolds further appealed to the Court of Appeals. In that Court the same course was pursued. Oral argument was made and elaborate briefs were submitted (see Brief, Vol. 7 of Record, pp. 201-412). Here again the appellants asserted the power of the Court to review the testimony and render affirmative judgment. The Court said (Vol. 4 of Record, p. 73):

> "We are of the opinion, therefore, that where the decision of the Special Term does not state the facts found and the judgment entered thereon has been affirmed by the General Term, upon an appeal to this Court, all the facts warranted by the evidence and necessary to support the judgments below are presumed to have been found; hence, upon such an appeal we have no more control over the facts than

we have when specific findings are made by the Special Term and affirmed by the General Term.

"This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin in procuring the releases out of the case; but it cannot be said on the record before us that the evidence tending to show fraud was so irresistible as to make the omission to find fraud an error of law. Assuming that there was evidence enough to warrant the inference of fraud, there was also ample evidence to warrant the inference that there was no fraud. A question of fact was thus presented which is beyond our power of review. The only ground upon which it is claimed that the alleged fraud was so conclusively proved as not to involve a question of fact is, that the residuary legatees did not state that there was a secret trust in favor of the colleges named in the ninth article of the will, and that the effect of that trust was to vest the bulk of the residuary estate in the widow and next of kin. What are the facts? The residuary legatees were engaged in settling a law suit with hostile parties toward whom they sustained no fiduciary relations, and who were represented by counsel of the highest standing and ability. Substantially all of the material facts had been disclosed by the evidence taken during the trial in which both parties to the releases were then engaged. The residuary legatees had been examined at length upon the witness' stand by counsel for the widow and next of kin, and had ample opportunity to make full discovery. While they took the position to which they still adhere, that the gift to them was absolute, that position was not acquiesced in by the widow and nieces, for their counsel openly claimed and argued in the Surrogate's Court that there was a secret trust which was invalid, and that their clients were entitled to

the residuary estate. While there may have been concealment of opinions, there was no concealment of facts upon which those opinions were based. The residuary legatees were not bound to volunteer their opinions even if they then thought there was a secret trust. One who is trying to settle litigation has the right to keep his opinion on the merits to himself. The controversy as to whether there was a secret trust or not, as well as the contest over the probate of the will, was fairly covered by the terms of the releases, so far as the parties to those instruments were concerned. They dealt with each other at arm's length as adversary parties, knowing the substantial facts, and they are presumed to have had them in mind when the releases were executed, and to have covered by the language used all questions to which those facts could give rise. Even if we hold, when we reach the question, that there was a secret trust, that will not convict the residuary legatees of fraud in claiming the contrary before the Surrogate, for one who neither withholds nor misstates the facts cannot be adjudged guilty of fraud simply because the Courts finally decide the law to be other than he claimed it to be while engaged in litigation over the subject. Such a rule would make nearly every unsuccessful litigant guilty of fraud. From this statement it is obvious that there was no such concealment as would require the Court, if the trial were before a jury, to direct a verdict on the basis of fraud proved beyond question."

All of the Judges of the Court of Appeals were unanimous, except that Chief Judge Andrews dissented from the majority of the Court and held, in a separate opinion, that, in his view of the case, the donees named in the deed of gift were entitled to the fund; but on the question of fraud he held against Fayerweather, Achter and Reynolds.

The opinion of the Court of Appeals is printed in full in 151 New York, page 282, in the Record herein, Volume 4, page 70. The opinion of the General Term will be found in Volume 4 of Record, page 52.

Upon affirmance in the Court of Appeals, motion was made by Fayerweather, Achter and Reynolds to amend the remittitur by directing a trial and decision by Judge Truax on the question of fraud. This was the first time the question was raised. The motion was denied.

Following the decision of the Court of Appeals there was an accounting before Charles W. Dayton, the referee named in the Truax judgment. To the report filed by the referee the complainants, Fayerweather, Achter and Reynolds, filed exceptions. Such exceptions were overruled and final judgment was entered upon notice to the attorneys for the complainants, dated July 6, 1896. This final judgment was served upon the attorneys for the widow's executors and next of kin with a notice of entry. The judgment is printed in vol. 7 of the record, page 508; and from this decree no appeal has been taken by the complainants in the bill or cross-bill. This decree is final, and directs payment by Bulkley, Ritch and Vaughan of the fund which was the subject matter of that action and of this action to the colleges named in the ninth clause of the will and to the Northwestern University, and further provides as follows:

> "It is further adjudged and decreed that upon payment being made by said Ritch, Bulkley and Vaughan of the various sums hereinbefore directed to be paid by them, in the manner hereinbefore provided, the said Ritch, Bulkley and Vaughan, from and after the making of the said payments, be, and they are hereby discharged from all obligation to each of the parties to this action respecting the moneys

so paid, and from any obligation to account for the same."

The cause of action in the bill and cross-bill is precisely the same as that presented in Amherst v. Ritch. The complainants' cause of action has already been construed by the courts to some extent. Judge WHEELER, on demurrer to the bill (Fayerweather v. Ritch, 88 Fed. Rep., 713), said:

> "This suit is brought * * * to reach assets of the estate of Daniel B. Fayerweather, alleged to be now in the hands of the defendants as executors or trustees, and to belong in part to the plaintiffs as next of kin."

And in Fayerweather v. Ritch, 91 Fed. Rep., 721, referring to that part of the bill which bears upon the litigation of the State Court, Judge Wallace says (p. 724):

> "The theory of the present suit, as set forth in the bill, is that the complainants have never been heard upon the question of the validity of their releases; consequently, that the judgment of the state courts is not a bar to that question, and any adjudication to that effect by either of the state courts adverse to them is void, as contrary to due process of law."

Mr. Blaikie, who, upon the subject of the Fayerweather litigation may be conceded to have some information, in the Reynolds cross-bill, analyzes complainants' bill as follows:

> "The object of said bill of complaint is to secure the payment of the residuary estate and to obtain a decree of the cancellation of certain releases and the avoidance of certain decrees of the Surrogate's Court, and of certain judgments of the Supreme Court of the State of New York as colorable clouds upon the title to said residuary estate."

The pleas of the defendants present the single point of a judgment in bar in an action in the Supreme Court, binding upon the complainants in the bill and cross-bill, and that point is evidenced by the record of proceedings in Amherst v. Ritch.

That the judgment and record in Amherst v. Ritch was *res adjudicata* upon the right, title or interest of the complainants Fayerweather and Achter in the bill, and Reynolds, as executor, in the cross-bill, there can be no doubt, we submit, in the light of the following authorities:

Fayerweather v. Ritch, 91 Fed. R., 721;
Landon v. Bulkley, 95 Fed. R., 344;
Manhattan Trust Co. v. Trust Co. of North America (C. C. A. 8th Circuit), 107 Fed. R., 328;
New Orleans v. Citizens' Bank, 167 U. S., 371;
Cromwell v. County of Sac, 94 U. S., 352;
U. S. v. Calif. & Oregon Land Co., 192 U S., 355;
Dowell v. Applegate, 152 U. S., 327-343;
Wilson's Exr. v. Deen, 121 U. S., 525;
Stout v. Lye, 103 U. S., 66;
Lumber Co. v. Buchtel, 101 U. S., 638;
Mitchell v. First Natl. Bank of Chicago, 180 U. S., 471;
Manson v. Duncanson, 166 U. S., 533;
U. S. v. Throckmorton, 98 U. S., 65;
Smith v. Nelson, 62 N. Y., 288, 289;
Sanders v. Soutter, 126 N. Y., 199;
Herring v. N. Y. L. E. & W. RR. Co., 105 N. Y., 340;
Pray v. Hegeman, 98 N. Y., 358;
Thorn v. *De Breteuil*, 179 N. Y., 64 at 79;
Leavitt v. Wolcott, 95 N. Y., 212.

In Fayerweather v. Ritch, 91 Fed. Rep., 721, the judgment in Amherst v. Ritch was considered in the case at bar, in the Circuit Court of Appeals,

Second Circuit. After the decision of Judge Wheeler overruling defendant's demurrers a motion was made by plaintiffs in the bill for an injunction and for the appointment of a receiver. In opposing the motion defendants put in as part of their papers in opposition to the motion the record in Amherst vs. Ritch. The motion for an injunction was granted and defendant appealed to the Circuit Court of Appeals where the ~~motion~~ was reversed. The opinion of Chief Judge Wallace will be found in the Record, Vol. 1, page 103, and is reported as above stated. The case was decided upon the broad ground as to the effect of the judgment, as an estoppel. Judge WALLACE at page 105, Vol. 1, of Record, says:

> "If the Trial Court had assumed to pass upon the question of the validity of the releases and had decided it erroneously, either upon a misconception of the law or of the evidence, it is entirely plain that the adjudication, so long as unreversed, would have been final, and that question could not have been reopened in any subsequent litigation between the same parties. The Trial Court held that the releases were without effect on the rights of the parties, and even though that decision was erroneous, it was final between the parties until reversal; and if it be assumed that the opinions of the appellate courts should be treated as a reversal of that decision, and that both of these courts erroneously held the release to be valid, these determinations are final between the parties upon that question. The complainants have had their day in Court before tribunals having jurisdiction to settle their rights, and even if there has been a miscarriage of justice, they must submit. *"Interest reipublicas ut sit finis litium."* The proposition that their rights have been disposed of without due

process of law is too preposterous to merit discussion. They have had a trial according to the settled course of judicial proceedings. They have been heard and heard *ab libitu*, though without avail."

In Manhattan Trust Co. v. Trust Co. of N. America, 107 Fed. R., 328 (C. C. A. 8th Circuit) at p. 332, the Court said:

"The intervenor's contention is that the issue "arising upon the equitable ground of recovery "set up in his first amended petition was not "considered or passed upon by the Court, but "that the case was decided and the petition "dismissed on another ground. In proof of "this contention we are referred to the opinion "of the lower Court and of this Court in the "first case, from which it appears the only right "of recovery considered by each court in its "opinion was that based on the alleged land-"lord's lien, and that no mention was made "of the equitable lien set up and relied upon "in the petition as one of the grounds of relief, "the denial of which by the lower Court was "assigned for error. But this fact in no way "militates against the conclusiveness of the "estoppel arising from the former adjudication "apparent upon the inspection of the record. *"When the plaintiff rests his claim for relief "in his bill on two or more grounds, and his "bill is dismissed generally on its merits, he is "thereafter estopped from maintaining a second "bill seeking the same relief upon one of the "grounds set up in his first bill and in issue "under the pleadings. A judgment or decree "rendered upon the merits constitutes an abso-"lute bar to a subsequent action on the same "claim or demand, and it is no answer to the "plea of estoppel in such a case to say the "Court did not, in its opinion, consider the par-"ticular ground of relief. Its decree dismiss-*

"ing the bill on its merits covers all the grounds "for relief set up in the first bill and put in is- "sue by the pleadings as fully and effectually "as if they had been specifically named in the "Court's opinion. Any other rule would make "litigation interminable. As long as a party "could show that the Court, in its opinion, took "no notice of one of its alleged grounds for re- "lief he could file a new bill seeking the same "relief sought by his first bill on that ground, "and so on as long as any one of the grounds "of relief set up in his first bill was not dis- "cussed, and in terms decided against him, in "the opinion of the Court. The rule is more "comprehensive than we have stated, and goes "further than is necessary to bar the present "suit. It is enough to bar the second suit that "the same grounds of recovery might have been "set up and relied on in the first suit. 'The "language, therefore,' says the Supreme Court "in Cromwell v. Sac County, 94 U. S., 351, 24 "L. Ed., 195, 'which is so often used, that a "judgment estops not only as to every ground "of recovery or defense actually presented in "the action, but also as to every ground which "might have been presented, is strictly ac- "curate when applied to the demand or claim "in controversy. Such a demand or claim, "having passed into judgment, cannot again "be brought into litigation between the parties "in proceedings at law upon any ground what- "ever.'"

In Wilson, Exr. v. Deen, 121 U. S., 525, at 534, Mr. Justice FIELD said:

"The effect of the judgment is not at all dependent upon the *correctness of the verdict or finding* upon which it was rendered. It not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided, whether

the decision was right or wrong." (Citing many cases.)

In New Orleans v. Citizens Bank, 167 U. S., 371, at 398, Mr. Justice WHITE, quoting from Cooley on Const. Lim., p. 47, *et seq.*, says:

> "No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies.
>
> "*Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imparts absolute verity, and the parties are forever estopped from disputing its correctness.*
>
> "Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objections, *though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court.*"

Citing:

Bigelow on Estoppel, 3rd Ed., p. 29.

In Cromwell v. County of Sac, 94 U. S., 352, FIELD, J., said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered

and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

In Stout v. Lye, 103 U. S., 66, one Lye executed a mortgage to the First National Bank, which the bank brought suit to foreclose in the State Court. Thereafter Stout Brothers sued Lye on a debt in the United States Circuit Court and recovered judgment which gave a lien on the equity of redemption. Thereafter the Stouts brought suit against Lye and the bank to set aside the mortgage on account of illegality, and subsequently the State Court rendered judgment of foreclosure and it was held: this judgment bound the Stouts, although not parties, and therefore their bill was dismissible, even though they were not parties, for when the action to foreclose was begun, they, as yet, were merely general

creditors of Lye and through him they are bound. Said the Court, page 70:

> "The two suits related to the same subject matter, and were in fact pending at the same time in two courts of concurrent jurisdiction. The parties also were in legal effect the same, because in the State Court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose. By electing to bring a separate suit the Stouts voluntarily took the risk of getting a decision in the Circuit Court before the State Court settled the rights of the parties by a judgment in the suit which was pending there. Failing in this, they must submit to the same judgment that has already been rendered against their representative in the State Court. That was a judgment on the merits of the identical matter now in question, and it concluded the 'parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other possible matter which might have been offered for that purpose' (Cromwell v. County of Sac, 94 U. S., 351-2). It is true the mortgagor did not set up as a defence that the bank had no right to take the mortgage, or that he was entitled to certain credits because of payments of usurious interest, but he was at liberty to do so. Not having done so, he is now concluded as to all such defences, and so are his privies."

In Lumber Co. v. Buchtel, 101 U. S., 638, defendant guaranteed payment of purchase price of some timber lands, and was sued by plaintiff for first installment of same. Defendant set up inducements if quantity of the goods were made, but Referee found against defendant. Subsequently, this suit was brought for the remaining install-

ment. Defendant set up fraudulent representations regarding quantity and that such representations amounted to a warranty. Plaintiff set up former judgment as a bar. Held *res adjudicata* applicable, FIELD, J., said:

> "And the question presented for determination is, whether that judgment was conclusive.
>
> "As to the first defence there can be no doubt such must be the effect of the judgment. The case was between the same parties for the first instalment on the contract guaranteed, and a recovery was there resisted upon precisely the same ground here urged.
>
> "The extent and effect of a former recovery between the same parties upon the same question raised in a new action have been so often considered and determined by this Court that it would be a waste of time to go over the argument and repeat our views on the subject. Our latest expression of opinion, made after deliberate consideration, is found in the case of Cromwell v. County of Sac, 94 U. S., 351. To the reasons there adduced we have nothing to add. And we are of the opinion the second defence is also concluded by the former adjudication. The finding of the Referee, upon which the judgment was rendered and this finding, like the verdict of a jury, constitutes an essential part of the record of the case—shows that no representations as to the quantity of timber on the land sold were made to the defendant by the plaintiff or in his hearing to induce the execution of the contract of guaranty. This finding having gone into the judgment is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every defence requiring the negation of this fact is met and overthrown by that adjudication."

In Mitchell v. First National Bank of Chicago, 180 U. S., 471 (1901), one Mitchell and wife

became guarantors on a note for Mitchell's firm. The guaranty was signed by the wife in Connecticut and mailed by the husband to Illinois. They were sued, the wife (husband having died) interposed the plea of non-liability because of her marriage, for, under the Connecticut statutes a married woman could not enter into a guaranty. It appears that, before the above suit, the wife had gone into bankruptcy in Connecticut, and the question arose in such bankrupcty, in the highest court of Connecticut, whether or not, being a resident of Connecticut and a married woman, she could contract and held: She could not.

In the above suit brought in the Circuit Court of the United States, the Circuit Court of Appeals held the State Court was in error, that the laws of Illinois must govern her contract and not Connecticut, and on appeal, the Supreme Court of the United States held *res judicata* applied; that the highest court of Connecticut, having held her not liable it mattered not whether the Circuit Court of Appeals differed regarding her liability, the judgment of the State Court binding—b ng between same parties or privies.

At page 480, HARLAN, J., said:

> "We are of the opinion that the bank was concluded by the judgment in the State Court. In the recent case of Southern Pacific Railroad Co. v. United States, 168 U. S., 1, 48, we said, after an extended examination of the adjudged cases, *that a* right, *question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a* different *cause of action, the* right, *question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the* judgment *in*

the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the PEACE and REPOSE of society by the settlement of matters capable of judicial determination. *Its enforcement is essential to the maintenance of social order;* for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

At page 481:

"Whatever may be the nature of a question presented for judicial determination—whether depending on federal, general or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject matter binds the parties and their privies so long as the judgment remains unmodified or unreserved."

In *U. S.* v. *California & Oregon Land Co.,* 192 U. S., 355, it was held that a decree rendered upon a bill in equity, brought under the Act of March 2, 1889 (25 Stats., 850), to have patents for land declared void and forfeited and to establish the title of the United States to the land, is a bar to a subsequent bill brought against the same defendants to recover the same land on the ground that it was excepted from the original grant as an Indian reservation. In that case, page 358, Mr. Justice HOLMES said:

"But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim. He cannot divide the grounds of his recovery. Unless the

statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patent void, and when the bill was dismissed, was barred as to all by the decree." (Cited many cases.)

In Landon v. Bulkley, the validity of the judgment in Amherst v. Ritch was attacked by one Landon, as assignee of Union College, or of the donees named in the deed of gift. The defendants' executors demurred. The demurrer was sustained by WALLACE, C. J., in the following opinion:

"In the action brought in the State Court "by the trustees of Amherst College and others "against Bulkley, Ritch and Vaughan and "others, including the trustees of Union Col- "lege, the question of the right of the latter to "the fund now in controversy was finally ad- "judged, it being decided that the institutions "named in the ninth clause of the Fayerweather "will were entitled to the same, to the exclusion "of the trustees of Union College, and decreed "that Bulkley, Ritch and Vaughan pay and "distribute the same accordingly. That judg- "ment is conclusive upon the question of the "right of the trustees of Union College to that "fund, and the complainant, their subsequent "assignee, not only in respect to all matters "which were actually litigated, but also in re- "spect to all other matters which could have "been litigated in the action. If the complain- "ant's bill can be sustained Bulkley, Ritch and "Vaughan would be compelled by a judgment "of this Court to pay to the complainant the "same fund which by the judgment in the State "Court they were decreed to pay to others, not- "withstanding the parties and the fund in con- "troversy are the same here as they were in the "former action.

"The demurrers are sustained, with costs."

This decision was affirmed in the Circuit Court of Appeals, 95 Fed. R., 344, upon authority of Fayerweather v. Ritch, 91 Fed. R., 721. A motion for a writ of certiorari was made to this Court upon the claim, among others, *that the judgment of the Supreme Court of the State of New York was not an estoppel.* It was denied by the Court in 176 U. S., 685, Vide motion papers therein.

In Smith v. Nelson, 62 N. Y., at pages 288 and 289, ANDREWS, J., says:

> "The jurisdiction in one Court to vacate, in "an independent proceeding, the judgment of "another having power to render it, is in its "nature so extraordinary as to demand a close "adherence to principles and precedents in ex- "ercising it. * * * That a judgment is "final and conclusive of the right or thing "which is adjudicated by it, is the rule, and "judgments and decrees of a competent court "will not be annulled for a *suspicion of fraud,* "*or because the party complaining may, in fact,* "*have been unjustly cast in judgment.* It is "not sufficient to authorize the interference of "the Court that it is shown that the claim upon "which the judgment was obtained was un- "founded, or that there was a good defense to "the action, or *the Court erroneously decided* "*the law,* or that the defendant omitted to avail "himself of his defense, if before the judgment "was rendered the facts were known, or might "by reasonable diligence have been ascertained "by him."

In Manson vs. Duncanson, 166 U. S., at page 546, Justice SHIRAS says:

> "We do not wish to be understood as intimat- "ing that either of such views" (referring to the ground of the decision of the Court whose judgment was sought to be attacked) "would "have been a sound construction of the trust "deed; but we do say that these were questions

"before the District Court for decision, and if "any error was committed by that Court the "remedy was by appeal or by a bill of review "if duly filed."

And at page 547:

"We adopt the language and reasoning of "the Court of Appeals in this case. * * * 'When a court has jurisdiction it has a right 'to decide every question that may arise 'in the cause; and *whether its decision be cor-'rect or not, its judgment until reversed is re-'garded as binding in every other Court.'*

'It is of no avail,' said this Court in Cooper v. Reynolds, 10 Wallace, 308, 'to show that 'there are errors in the record unless they be 'such as prove that the Court had no jurisdic-'tion of the case, or that the judgment rendered 'was beyond its power. This principle has 'been often held in this Court and by all Courts, 'and it takes rank as an axiom of law.'

In U. S. v. Throckmorton, 98 U. S., at page 65, MILLER, J., says:

"There are no maxims of the law more firmly "established, or of more value in the adminis-"tration of justice than the two which are de-"signed to prevent repeated litigation between "the same parties in regard to the same sub-"ject of controversy, namely, *'Interest rei pub-" 'licae ut sit finis litium,'* and *'Nemo debit bis " 'vexari pro una et eadam causa.'*

"If the Court *has been mistaken* in the law "there is a remedy by writ of error. If the "jury has been mistaken in the facts, the rem-"edy is by motion for new trial. If there has "been evidence discovered since the trial, a "motion for a new trial will give appropriate "relief. But all these are parts of the same "proceeding, relief is given in the same suit, "and the party is not vexed by another suit "for the same matter * * *.

In Sanders v. Soutter, 126 N. Y., at page 199, O'BRIEN, J., said:

> "If, when the release was produced before "the Surrogate, the plaintiff, who was a party "to the proceeding, could have then and there "contested its validity, and could have given "proof of the fraud now alleged, he must be "confined to that remedy, and cannot be per- "mitted to maintain an independent action to "try a question which he should have tried be- "fore the Surrogate.
>
> "Equity will not interfere to set aside pro- "ceedings in an action in another court upon "charges of fraud which could have been tried "and decided in that action, or where relief "is open in the action to the complaining party "by motion, appeal, or otherwise."

In Herring v. N. Y. L. E. & W. R. R. Co., 105 N. Y., 340, at page 372, EARL, J., says:

> "Where a Court having jurisdiction of the "subject matter and the parties pronounces "judgment upon insufficient or illegal evidence "*or mistakes the evidence or the law*, the only "remedy for any person aggrieved by the judg- "ment is by an appeal therefrom or a motion "in the action in which it was rendered; *but it* "*cannot be assailed collaterally.*"

In Pray v. Hegeman, 98 N. Y., at 358, ANDREWS, J., says:

> "The general rule is well settled that the es- "toppel of a former judgment extends to every "material matter within the issues which was "expressly litigated and determined, and also "to those matters which, although not express- "ly determined, are comprehended and involved "in the thing expressly stated and decided, "whether they were or were not actually liti- "gated or considered (citing cases).

"It is not necessary to the conclusiveness of "a former judgment that issue should have been "taken upon the precise point controverted in "the second action. Whatever is necessarily "implied in the former decision, is for the pur- "pose of the estoppel deemed to have been ac- "tually decided."

In *Dowell* v. *Applegate,* 152 U. S., 327, at p. 343, it was held:

"Having remained silent as to the deed of "October 8, 1874, and having allowed the suit "in the Federal Court to proceed to final de- "cree upon the question as to whether the lands "described in the bill could be subjected to "Dowell's demands, which description included "the 40 acres here in dispute, and having been "defeated upon that issue, and the decree hav- "ing been fully executed, he cannot have the "same issue retried in an independent suit "based solely upon a title that he was at liberty "to set up, but chose not to assert, before the "decree was rendered.

"The argument to the contrary seems to rest "principally, if not altogether, upon the "ground that the present suit is upon a cause "of action entirely different from that present- "ed in the suit in the Federal Court. In that "view, our attention is called to the case of "*Cromwell* v. *County of Sac,* 94 U. S., 351; *Rus- "sell* v. *Place,* 94 U. S., 606, and *Bissell* v. "*Spring Valley Township,* 121 U. S., 225, 231. "Those cases hold that a judgment by a court "of competent jurisdiction as to parties and "subject matter is a finality in respect to the "claim or demand in controversy, 'including " 'parties and those in privity with them, not " 'only as to every matter which was offered " 'and received to sustain or defeat the claim " 'or demand, but as to any other admissible " 'matter which might have been offered for " 'that purpose.' 'Thus, for example,' the

"Court said in *Cromwell* v. *County of Sac,* 'a
" 'judgment rendered upon a promissory note
" 'is conclusive as to the validity of the instru-
" 'ment and the amount due upon it, although
" 'it is subsequently alleged that perfect de-
" 'fences actually existed, of which no proof was
" 'offered, such as forgery, want of considera-
" 'tion, or payment. If such defences were not
" 'presented in the action and established by
" 'competent evidence, the subsequent allegation
" 'of their existence is of no legal consequence,
" 'the judgment is conclusive so far as future
" 'proceedings at law are concerned, as though
" 'the defences never existed.' In that case it
"was further held, and the same principle was
"announced in the other cases, that 'where the
" 'second action, between the same parties, is
" 'upon a different claim or demand, the judg-
" 'ment in the prior action operates as an es-
" 'toppel only as to those matters in issue or
" 'points controverted, upon the determination
" 'of which the finding or verdict was rendered.'
"To the same effect were prior decisions of this
"Court. *Hopkins* v. *Lee,* 6 Wheat, 109, 113;
"*Smith* v. *Kernochen,* 7 How., 198, 217; *Pen-*
"*nington* v. *Gibson,* 16 How., 65, 77; *Lessee of*
"*Parish* v. *Feris,* 2 Black, 606, 609. And the
"same doctrines were subsequently reaffirmed
"in *Lumber Co.* v. *Buchtel,* 101 U. S., 638, 639,
"and *Stout* v. *Lye,* 103 U. S., 66, 71, and at the
"present term, in *Johnson Company* v. *Whar-*
"*ton Company, ante,* 252. To these we may add
"the case of *Stockton* v. *Ford,* 18 How., 418, 420,
"in which it was said: 'One of the questions
" 'now sought to be agitated again is precisely
" 'the same as this one in the previous suit,
" 'namely, the right of the plaintiff to the ju-
" 'dicial mortgage under the execution and sale
" 'against Prior. The other is somewhat varied,
" 'namely, the equitable right or interest in the
" 'mortgage of the plaintiff, as the attorney of
" 'Prior, for the fees and costs provided for in
" 'the assignment to Jones. But this question

" 'was properly involved in the former case,
" 'and might have been there raised and deter-
" 'mined. The neglect of the plaintiff to avail
" 'himself of it, even if it were tenable, fur-
" 'nishes no reason for another litigation. The
" 'right of the respective parties to the judicial
" 'mortgage was the main question in the for-
" 'mer suit. That issue, of course, involved the
" 'whole or any partial interest in the mort-
" 'gage. We are satisfied, therefore, that the
" 'former suit constitutes a complete bar to the
" 'present.' So far from the above cases sus-
"taining the decision of the Supreme Court of
"Oregon, they support the views we have ex-
"pressed. The present suit is not a second one
"between the same parties upon a different
"claim or demand. It seeks by additional evi-
"dence to reopen the controversy that arose,
"and was determined in the suit in the Federal
"Court as to the right of Dowell to have all the
"land described in his bill subjected to his
"claims. While the position of the parties is
"reversed, Daniel W. Applegate, who contested
"that right in the suit in the Federal Court—
"so far as that suit related to the lands then
"claimed by him, including the 40 acres here
"in dispute—seeks under the guise of a new
"suit to obtain a re-examination, not upon any
"ground of fraud in obtaining that decree, but
"in the light simply of the conveyance of Octo-
"ber 8, 1874, from W. H. H. Applegate, which
"conveyance, although existing before Dowell
"commenced his suit, indeed, before Dowell ac-
"quired any judgment lien of record, he delib-
"erately refrained from bringing to the atten-
"tion of the Federal Court in some appropriate
"form in support of his defence. The present-
"ing in this suit of the fact of that conveyance
"for the purpose of showing that the 40 acres
"in question should not have been subjected to
"sale for Dowell's demands, does not, within
"the rule announced in the cases above cited,
"make a different claim or demand. On the

"contrary, the matter now presented was em-
"braced by the issues in the suit in the Federal
"Court, and was there determined when that
"Court, upon final hearing, adjudged that the
"121.55 acres (which embraced the 40 acres
"now in dispute) should be sold to pay Dow-
"ell's claims. This case, consequently, comes
"within the rule that 'a judgment estops not
" 'only as to every ground of recovery or de-
" 'fence actually presented in the action, but
" 'also as to every ground which might have
" 'been presented.' "

Whether Judge Truax did or did not pass upon the question of fraud in the releases, the fact was determined in the judgment in that action that the twenty-one colleges named in the will were entitled to the fund, which was the subject matter of the action. That judgment specifically directed the executors, Ritch, Bulkley and Vaughan, to pay that fund to those colleges and expressly discharged them from farther liability to all parties to that action upon such payment. Whether the decision was correct or not, the judgment until reversed or modified by proceedings in the action must be regarded as binding in every court upon the parties to that suit. Whether the reasons upon which the judgment was based were sound or not, and even if no reasons at all had been given, the parties are forever estopped from disputing its correctness. The justice of such a rule must be recognized when it is recalled that if in this action judgment should be rendered in favor of the plaintiffs in the bill and cross-bill, the defendants Ritch, Bulkley and Vaughan would be directed to pay by the judgment of the Federal Court to the plaintiffs Fayerweather, Achter and Reynolds, the same identical fund which by the judgment of the State Court in Amherst v. Ritch, they had been directed to pay to the twenty-one colleges, and notwithstanding

the fact, that the conclusiveness of the judgment in that case has been tested in this same Federal Court in the case of Landon vs. Bulkley, *supra*, and in respect of which this Court has denied a writ of certiorari.

Landon v. Bulkley, 176 U. S., 685.

POINT III.

Due process of law was not denied to complainants, Fayerweather, Achter and Reynolds, in the proceedings in Amherst v. Ritch.

That Fayerweather, Achter and Reynolds were properly before the Court, were duly represented by counsel, that the Court had jurisdiction of all parties and the subject matter of the action, and that there was notice and opportunity to be heard, is not denied.

The claim of the complainants comes down to this, that although there was notice, opportunity to be heard and actual hearing, the Court did not take the view of the complainants, and for that reason, there was a denial of due process of law.

But if we assume, for the purpose of argument, that Judge Truax was in error in his view of the application of Chapter 360 of the Laws of 1860, still that does not establish that Fayerweather, Achter and Reynolds were deprived of a fundamental right in having the case decided upon the ground that that Statute had no application to the secret trust upon which Judge Truax decided in favor of the twenty-one colleges.

In *Simon* v. *Craft,* 182 U. S., 427, at 436, Mr. Justice WHITE said:

> "The essential elements of due process of law are notice and opportunity to defend."

Citing

Louisville & Nashville R. R. v. *Schmidt,* 177 U. S., 230.

This definition was approved by Mr. Justice Peckham in

New Orleans Water Works Co. v. *Louisiana,* 185 U. S., 336, at page 350,

and it may be said to be the generally accepted definition of the term "due process of law."

If the requirements of due process of law are fulfilled by notice and opportunity to defend, it is true, as stated by Judge WALLACE, in *Fayerweather* v. *Ritch,* 91 Fed. Rep., 721, 34 Cir. Ct. of Appls., 61, that

> "The proposition that their rights have been disposed of without due process of law is too preposterous to merit discussion.
>
> They had a trial according to the settled course of judicial proceedings. They have been heard and heard *ad libitum,* though without avail."

The Code of Civil Procedure of the State of New York affords a complete and harmonious system for bringing parties into court; for a full and fair trial of issues, and for subsequent appeals for the corrections of errors in the trial of the cause.

See

Section 1022 Code of Civil Procedure;
" 1317 " " " " ;
Bomeisler v. *Forster,* 154 N. Y., 237.

In the consideration of the question, reference must be had to the system of judicial procedure prevailing in the State of New York at the time. The question is, in fact, more legislative than judicial, and the inquiry must be, whether, in that process of law, if followed, there is any violation of fundamental rights secured by the Federal Constitution. This is illustrated in the following cases:

In *Kennard* v. *Louisiana ex rel., Morgan,* 92 U. S., 480, ~~Chief~~ Justice WHITE said, on page 481:

> "The sole question presented for our consideration in this case, as stated by counsel for the plaintiff in error, is, whether the State of Louisiana, acting under the statute of Jan. 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law.
> * * *
>
> "The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection granted by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State Courts. Our authority does not extend beyond an examination of the powers of the courts below to proceed at all. (The Chief Justice then examines the statute and concludes:)
>
> "From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the Court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defence; for the deliberation and judgment of the Court; for an appeal from this judgment to the highest Court of the State, and for hearing and judgment there. A mere statement of the facts

carries with it a complete answer to all constitutional objections urged against the validity of the act. The remedy provided was certainly speedy, but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. *In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the Court in which the proceedings were originally instituted, and upon his appeal, in the highest court of the State."*

And in *Louisville & Nashville R. R.* v. *Schmidt*, 177 U. S., 230, at page 236, Mr. Justice WHITE says:

"It is no longer open to contention that the due process clause of the Fourteenth Amendment of the Constitution of the United States does not control mere forms of procedure in State courts or regular practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

Citing

Iowa R. R. Co. v. *Iowa*, 160 U. S., 389;
Wilson v. *North Carolina*, 169 U. S., 586.

The most that can be said is, that Judge Truax took an erroneous view of the law in respect to the application of Chapter 360 of the Laws of 1860; but that was merely an error of judgment of the Trial Court. The Code of Civil Procedure in New York provides fully for the corrections of such errors upon appeal.

The settled law of the State did not require that in such an appeal in equity the General Term should reverse the judgment and order a new trial,

but on the contrary, that the judgment might be expressly affirmed if it could be sustained upon other grounds than those stated by the Trial Judge.

A correct decision will not be reversed on appeal because founded upon a wrong reason.

Ward v. *Hasbrouck,* 169 N. Y., 407, at p. 420;
Morvin v. *Univ. Life Ins. Co.,* 85 N. Y., 278, at 284;
Allard v. *Graesert,* 61 N. Y., 1, at p. 4;
Ferguson v. *Gill,* 74 Hun, 566.

In Ward v. Hasbrouck, *supra,* the Court said:

> "The fact that the judgment of the Trial Court was sustained by the Appellate Division on a different theory than that now adopted, affords no obstacle to the affirmance here.
>
> We have held that a correct decision will not be reversed on appeal because founded upon a wrong reason, at least, unless where the ground of decision can be seen to have misled a party to his injury."

And in *Keegan* v. *Smith,* 60 App. Div., 168, affid. in Court of Appeals, 172 N. Y., 625, the Court said at p. 172:

> "Such a finding was not necessary to sustain the judgment, but if it had been, the rule is settled that the evidence may be referred to to see whether there was sufficient proof to warrant it, although it was not made; and if there is sufficient, the judgment will be sustained, although the finding is not actually made by the Court. (*Chubbuck* v. *Vernam,* 42 N. Y., 432; *Valentine* v. *Connor,* 40 *id.,* 248).
>
> "But while the Court is at liberty to examine the evidence to see whether there was sufficient proof to sustain the decision, it is not at liberty to examine the evidence to see whether there was testimony to supply a find-

ing to reverse the judgment." (*Equity Co-op. Fndry. Co.* v. *Hersee,* 103 N. Y., 25.) So that even if it were necessary for the Court to have found that the administrator was not in fact able to pay these judgments, yet if he did not, we may examine the case to see whether there was evidence that he was actually able to pay them."

This was precisely the rule which was followed upon appeal to the General Term. The judgment was affirmed upon a different theory from that adopted by Judge Truax in respect of the application of the law of 1860 to the secret trust; but it was held that the judgment was right for the reason that the evidence in the record did not justify the contention of fraud in the releases.

How can it be said, in view of these facts and this condition of law, that there was no notice or opportunity to be heard or to defend? That the Federal courts cannot sit in review of mere errors of the State Court other than jurisdiction is too well settled for controversy.

In *Arrowsmith* v. *Harmoning,* 118 U. S., 194, Chief Justice WAITE said, on p. 195:

> "It is not denied that the Probate Court had full and complete jurisdiction of the proceeding to sell the land. The statute under which the Court acted would, if followed, have furnished Arrowsmith with all the protection which had been guaranteed to him by the Constitution of the United States. The bond in question was a matter of procedure only, and if it ought to have been required, the Court erred in ordering the sale without having first caused it to be filed and approved. At most, this was an error of judgment in the Court. The constitutional provision is, 'Nor shall any State deprive any person of * * * property without due process of law.' Certainly a State cannot be deemed guilty of a violation of this

constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The Legislature of a State performs its whole duty under the Constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings."

In re Converse, 137 U. S., 624, at p. 631, Mr. Chief Justice FULLER said:

"It is not in our province to inquire whether the conclusion reached and announced by the Supreme Court was or was not correct, for we are not passing upon the judgment as a court of error; nor can we consider the contention that the decision was not in harmony with the State Constitution and laws * * * But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of the highest Court, while acting within its jurisdiction; and conceding that an unconstitutional conviction and punishment under a valid law would be as violative to a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision.

Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an un-

restrained and arbitrary exercise of power as to be utterly void."

Citing

Arrowsmith, *supra.*

In Central L. Co. v. Laidlay, 159 U. S., 103, at p. 110, Justice GRAY says:

"As was said by this Court, speaking by Mr. "Justice Grier, in such a case, as long ago as "1847: 'It is the peculiar province and privilege "'of the State courts to construe their own "'statutes, and it is no part of the function of "'this Court to review their decisions or as-"'sume jurisdiction over them on the pretense "'that their judgments have impaired the ob-"'ligations of contracts. The power dele-"'gated to us is for the restraint of unconsti-"'tutional legislation by the States, and not "'for the correction of *alleged errors com-*"*'mitted by their judiciary.*' The same doc-"trine was stated by Mr. Justice Harlan (in "Lehigh Water Co. v. Easton, 121 U. S., 388-"392) speaking for this Court as follows: 'The "'State Court may erroneously determine ques-"'tions arising under a contract which consti-"'tutes the basis of the suit before it. It may "'hold a contract void which in our opinion is "'valid; it may adjudge a contract to be valid "'which in our opinion is void, or its interpre-"'tation may in our opinion be radically "'wrong, but in neither of such cases would the "'judgment be reviewable by this Court under "'the clause of the Constitution protecting "'the obligations of contracts against impair-"'ment by State legislation and under the ex-"'isting statutes defining and regulating the "'jurisdiction.'"

And at page 112: "*When the parties have "been fully heard in the regular course "of judicial proceedings, an erroneous de-"cision of a State Court does not deprive the "unsuccessful party of his property without*

"due process of law within the Fourteenth "Amendment of the Constitution of the United "States."

Citing

Walker v. Sauvinet, 92 U. S., 90;
Head v. Amoskeag Co., 113 U. S., 9-26;
Morley v. Ry. Co., 146 U. S., 162, 171;
Bergemann v. Backer, 157 U. S., 655.

In West v. Louisiana, 194 U. S., 258, this Court held that

> "The construction of the State Constitution and statutes and the common law on the subject of reading depositions of witnesses in criminal trials is not a federal question, and this Court is bound in such cases by the construction given thereto by the State Court."

And at page 261, Mr. Justice PECKHAM said:

> "Whether the State Court erred in its construction of the State Constitution and statutes and the common law, on the subject of reading depositions of witnesses, is not a federal question. We are bound by the construction which the State Court gives to its own Constitution and statutes and to the law which may obtain in the State, under circumstances such as those existing herein."
>
> * * * * * *
>
> "The State of Louisiana had the right to alter the common law at any time, although it had theretofore adopted it with certain limitations. If through its courts it erred in deciding what the common law was, yet if no fundamental and absolutely all important right were thereby denied to an accused, he still had *due process of law*, and could not complain to the Court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of its federal constitution."

In Caldwell vs. Texas, 137 U. S., 692, Mr. Chief Justice FULLER says, on p. 697:

> * * * "Law in its regular course of administration through courts of justice, is *due process*, and when secured by the law of the State, the constitutional requisition is satisfied. * * *
>
> "The case before us is destitute of the elements of a federal question, *since there was nothing special, partial or arbitrary, or in violation of fundamental principles, in the law of the State in accordance with which the indictment was found*, and as applied in passing upon its sufficiency. The plaintiff in error was not denied the equal protection of the laws, nor deprived of the process due by the law of the land. The Constitution of Texas secured to him the right to demand the nature and cause of the accusation against him, and the State Court determined, as was its province, that this demand was satisfied by the indictment in question. His objections were in effect to the *technical sufficiency of the indictment, but not that his rights had been determined by any other rules than those applied to the rest of the community, nor that the court had done more than commit error in the disposition of a subject within its jurisdiction.*"

The Fourteenth Amendment of the Constitution in no way undertakes to control the power of a State to determine by what process legal rights may be ascertained or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard *before the issues are decided.*

Iowa Cent. R. R. Co. v. *Iowa*, 160 U. S., 389.

In *People ex rel. Witherbee* v. *Supervisors,* 70 N. Y., 228, at 234, Judge FOLGER held that

> "Due process of law requires that a party shall be properly brought into Court, and that he shall have an opportunity, when there, to prove any fact which, according to the Constitution and usages of common law, would be a protection to him or his property."

These decisions do not recognize the constitutional right of a litigant, when he has had opportunity to present his proof, to have a decision in any particular form or manner upon that proof. And it is in respect of this that the distinction is found in the case of *Hovey* v. *Elliot,* so much relied upon by the appellants. In that case, while the party had notice, he did not have opportunity to be heard, for the reason that his answer had been stricken out by the Court, and it was therefore held that there was not fair opportunity to be heard. But when, as in the case at bar, there has been notice, appearance, and full and complete opportunity to be heard *ad libitum* upon the issues raised by the answer before the Court, there is nothing in the Constitution, nothing in the cases construing the term "due process of law," which demands, as one of the elements of due process of law, that the decision of the Court determining the rights as between the different litigants shall be made in any particular way.

In *Davidson* v. *New Orleans,* 96 U. S., 97, at 104, Mr. Justice MILLER says:

> "There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and

the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. * * *

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * *

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issue affecting it, he has, by the laws of the State, a fair trial in a Court of Justice, according to the modes of proceeding applicable to such a case. * * *

"Before the assessment could be collected, or become effectual, the statute required that the table of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown or could not be found. This was complied with, and the party complaining here appeared and had a full and fair hearing in the Court of the first instance, and after-

wards in the Supreme Court. *If this be not due process of law, then the words can have no definite meaning as used in the Constitution.*"

See also

Gallup v. Schmidt 183 U. S., 300;

And

French v. Barber Asphalt Paving Co., 181 U. S., 324, for full review of case on due process of law.

POINT IV.

The testimony taken at large by complainants has not been discussed in this brief. Such discussion has no place upon this appeal.

The sole question is that relating to the effect of the judgment of the State Court. If that judgment is not a bar, that conclusion can only be reached on account of the failure of Judge Truax, the Trial Judge to consider and determine the question of fraud in the releases of the widow and next of kin, and upon the ground that the Appellate Courts, the General Term of the Supreme Court, and the Court of Appeals of the State of New York could not pass upon that question until it had been considered and determined by a Trial Court.

It is manifest that if the Appellate Courts of the State of New York, notwithstanding the broad terms of Sections 1317 and 1022 of the Code of Civil Procedure, could not pass upon that issue in the first instance, the same reasoning and argument would deny to this Court the right to consider the case at large and determine that issue upon this

appeal. The issue in the Court below was the issue of *res adjudicata* only. If this Court reaches a conclusion contrary to the determination of the Court below, the judgment must be reversed and the cause remanded for further proceedings, leading to a trial and determination of the validity of the releases.

> *Stead* v. *Course,* 4 Cranch, 405, at p. 413;
> *Farley* v. *Kitson,* 120 U. S., 303;
> *Dalzell* v. *Dcuber Watch Case Mfg. Co.,* 149 U. S., 315.

In *Stead* v. *Course,* Chief Justice MARSHALL said:

> "The plaintiffs, who were creditors of R. & S., brought this bill to subject a tract of land in the possession of the defendants to the payment of a debt for which they had obtained a decree against R. & S. The defendants plead that Daniel Course, under whom they claimed by descent, is a fair purchaser, for a valuable consideration, of the premises in question, at a sale thereof by a collector of taxes for the county in which they lie, made for taxes in arrear. The defendant also answered denying fraud. A replication was filed to the plea, and on a hearing it was sustained and the bill dismissed.
>
> In this case the merits of the claim cannot be examined. The only questions before the Court are upon the sufficiency of the plea to bar the action and the sufficiency of the testimony to support the plea as pleaded."

Upon examination of the law under which the tax sale was made, the Court reached the conclusion that the judgment was erroneous, and it was therefore reversed and the cause remanded, with the direction that defendant answer, etc.

This case was approved in *Farley* v. *Kitson,*

supra, where Mr. Justice GRAY, at page 315, quotes from the opinion of Chief Justice Marshall.

The cases of

Chapelle v. *U. S.*, 160 U. S., 499;
Nishimura Ekiu v. *U. S.*, 142 U. S., 651;
Horner v. *U. S.*, 143 U. S., 570;
U. S. v. *Jahn*, 155 U. S., 109,

are all distinguishable from the case at bar, and have no application in this case. There is no Federal statute involved in this case.

As the sole issue was *res adjudicata* in the Court below, the defendants have not put in their proof upon the question of fraud in the releases.

It is manifest, therefore, that a discussion of the case at large is out of place upon this appeal, and if indulged in by complainants, can only be for an ulterior motive. For the same reason a discussion of the voluminous and numerous assignments of error of the appellants, excepting those relating to the question of jurisdiction and the fourteenth amendment of the Constitution, has been omitted.

POINT V.

The appeals should be dismissed, or if it should be held that this Court has jurisdiction to entertain the appeals, the judgment should be affirmed, with a direction for costs in favor of defendants against the complainants in the bill and cross-bill in this court and in the court below.

The question of costs was left by the Circuit Court below for determination by the Appellate Court.

Vide Final Decree, Vol. 4 Record, fol. 1514, p. 783.

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